2010

Tooele Associates Limited Partnership v. Tooele City : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TOOELE ASSOCIATES LIMITED PARTNERSHIP, a Washington limited partnership, **Plaintiff/Appellant/Cross-Appellee,** **vs.** **TOOELE CITY, a municipal corporation,** **Defendant/Appellee/Cross-Appellant.**	**Appellate Case No. 20100504** **District Court No. 060919737**

BRIEF OF APPELLANT TOOELE ASSOCIATES LIMITED PARTNERSHIP

Appeal from the Interlocutory Order of the Third Judicial District Court of Salt Lake County, State of Utah, Dated June 3, 2010, Honorable Randall N. Skanchy, District Judge

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(*Note*: full recitations of Article I §10 of the Utah Constitution and Utah R. Civ. P. 49 are set forth verbatim in the Addendum to this Brief.)

JURISDICTION OVER THE APPEAL

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issue No.1: May the Jury's Verdict be read harmoniously, mandating the entry of a judgment that effectuates the Jury's mixed findings of fact and law and overall intent?

Standard of Review: Although no Utah appellate court appears to have directly addressed the standard of review to be employed,[1] the issue presents a question of law that should be reviewed for correctness, with no deference to the District Court. *Drake v. Industrial Comm'n of Utah*, 939 P.2d 177, 181 (Utah 1997). "[W]hether two verdicts are legally inconsistent is a question of law. As a result, a District Court's order granting or denying a new trial based on a claim of legally inconsistent verdict is subject to de novo review." *Redmond v. Soscha*, 837 N.E. 2d 883, 895 (Ill. 2005). To protect the substantial right to a jury trial, a court must, whenever possible, read a jury verdict as being harmonious and enter the verdict rendered. *Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078, 1082-83 (Utah 1985).

The District Court did not make a discretionary determination granting or denying a motion for a new trial. Rather, the issue is whether, as a matter of law, the District Court properly found the Jury's Verdict to be irreconcilably inconsistent, leaving it no other choice but to order a new trial. Even when a District Court's discretionary

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[1] Other courts have applied de novo review. See *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006); *Norris v. Sysco Corp.*, 191 F.3d 1043, 1047 (9th Cir. 1999).

determination is underpinned by a question of law, the decision is reviewed for correctness. *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073.

Preservation of Issue No. 1: Issue No. 1 was presented to the District Court and preserved for appeal when it was briefed by both parties, argued during hearings on post-trial motions, and addressed in the District Court's Memorandum Decision.[2]

Issue No. 2: Should the Verdict be interpreted under Utah R. Civ. P. 49(b) when the Jury made ultimate legal conclusions, was instructed to apply the law, and applied 69 Instructions in rendering the Verdict of mixed questions of fact and law?

Standard of Review: Both interpretation and application of a rule of procedure are questions of law, reviewed for correctness. *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073 ("interpretation of a rule of procedure is a question of law, and we review the trial court's decision for correctness"); *see Utah Medical Prod., Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998) (application of rule of procedure is a question of law).

Preservation of Issue No. 2: Issue No. 2 was presented below and preserved for appeal when it was addressed during oral argument on post-trial motions, and was ruled upon in the District Court's Memorandum Decision.[3]

Issue No. 3: In harmonizing the Verdict, should the District Court view the answers from the Jury's perspective, thereby limiting the harmonization analysis to the

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[2] [R. 24264-24310; R. 22884-22913; R. 22566-22606; R. 22935- 22968]; [R. 23008, 1-22-2010 Hearing]; [R. 23110, 2-4-2010 Hearing]; [R. 23295, 4-19-2010 Hearing].

[3] [R. 24276-24279]; [R. 23110, 2-4-2010 Hearing at pp. 19, 61-63]; [R. 23295, 4-19-2010 Hearing at pp. 73-79].

"case as submitted" – to the exclusion of arguments, pre-trial motions, rulings and issues not submitted to the Jury?

Standard of Review: Issue No. 3 does not appear to have been addressed directly in any state or federal case. In the seminal jury verdict interpretation case of *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108 (1963), the U.S. Supreme Court held that "the jury's findings of fact were consistent in light of the jury instructions and in the context of the entire special verdict." *Floyd v. Laws*, 929 F.2d 1390, 1396 (9th Cir. 1991) (*citing Gallick*, 372 U.S. at 121). This is a question of law that should be reviewed for correctness.

Preservation of Issue No. 3: Issue No. 3 was presented below and preserved for appeal when it was submitted to the District Court in briefing, argued during hearings on post-trial motions, and ruled upon in the District Court's Memorandum Decision. [R. 24287, 24290, 22947]; [R. 23008, Jan. 22, 2010 Hearing at pp. 35-36, 46].

STATEMENT OF THE CASE

Nature of the Case. This case involves a multi-million dollar dispute between Plaintiff/Appellant Tooele Associates ("TA"), a property developer, and Defendant Tooele City (the "City") regarding the Overlake development project in Tooele, Utah. In the early to mid 1990s, TA and the City formed a cooperative relationship – both eager for TA to undertake the massive 7,500 home master-planned development project within the City's boundaries. Over the next few years, the parties entered into a series of mutually-beneficial agreements regarding the project. Shortly after entering the Development Agreement, various disputes arose which eventually crippled the parties' working relationship, resulting in both parties asserting various claims against each other.

Course of Proceedings. TA initiated this action by filing a Complaint in 2002.[4] Over seven years the parties engaged in extensive litigation and discovery – more than 50 depositions and numerous motions. By the time the case was ready for trial the parties' claims were essentially reduced to complex claims and defenses for breach of contract and breach of the Covenant of Good Faith and Fair Dealing. [R. 21845- 21860]. After a three-week trial in June 2009 the jury returned a verdict form answering 33 questions and, ultimately, awarding TA $22.5 million in damages and the City a partially offsetting total of $1.82 million. The "net" award was $20,680,000.00 in favor of TA.

Disposition Below. After post-trial motions and hearings the District Court entered a Memorandum Decision, dated June 3, 2010, concluding that the jury's findings were "irreconcilably inconsistent" and declaring a mistrial. Permission to appeal the District Court's interlocutory order was granted, resulting in this appeal.

STATEMENT OF FACTS

The mutually-beneficial beginnings

On October 25, 1994, TA purchased approximately 2,760 acres of raw land (the "Land"), of which approximately 800 acres were located within the City and approximately 1,960 acres were located in Tooele County. With encouragement from the City, TA pursued development of a master planned community of over 7,500 residential units, commercial development, a town center, golf course and related master-planned

[4] The original suit filed by TA related solely to park impact fees, a claim that was later dismissed. The parties entered a standstill agreement regarding that claim until the standstill was ended by the City filing its counterclaims in 2004. After the City filed its counterclaims TA asserted claims related to the City's various breaches of the Development Agreement and bad faith. [R. 24334, Transcript Vol. 3, 640-42].

development to be called "Overlake." TA intended to sell developed lots to qualified builders who would construct homes for resale to customers. [R. 24333, Transcript[5] Vol. 2, 164-74, 275-76].

Through multiple meetings, TA and the City discussed how development of Overlake could be mutually beneficial. The City was positive and enthusiastic about the project. [*Id.* at 168-69, 178-82]; [R. 24332, Transcript Vol. 1, 117, 124].[6]

On November 15, 1995, the City and TA took their first formal step to implement their plans by entering into an "Annexation Agreement." [Exhibit 210]. The City received numerous benefits from TA under the Annexation Agreement, including:

- Annexing approximately 1,880 acres of Overlake into the City, thus increasing the City's base for ad valorem property taxes.
- Obtaining 30 acres from TA for the City's new Wastewater Treatment Plant (the "Treatment Plant"), plus necessary easements for the Treatment Plant.[7]
- Obtaining 686 acre feet of water rights from TA.
- TA agreeing to and later setting aside 584 acres for schools, a fire station, roadways, parks and other public services.
- TA agreeing to purchase up to 2.25 million gallons per day of treated wastewater from the City's Treatment Plant over the next 20 years.

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[5] "Transcript" refers to the written transcript of the trial; and "Exhibit" refers to the exhibits used at trial, unless noted otherwise.

[6] The former Mayor of the City, testifying that he "jumped high" and tried to encourage TA to come to Tooele. He also described the parties' relationship as "good" and that development of Overlake was a "win-win situation."

[7] The Annexation Agreement did not address what the City would pay for this acreage. Later, as part of the Development Agreement, TA deeded this land to the City for no monetary consideration, but instead for other benefits, namely, culinary water.

- TA agreeing to and later performing the construction, maintenance and management of an 18-hole public golf course (the "Overlake Golf Course").

- TA agreeing to and, later, constructing a main culinary water line connecting existing City service to the Treatment Plant. (TA paid half of the cost of this water line.)

[Exhibit 210].

On June 1, 1996, the City and TA entered into the Land Application Agreement/ Funding Agreement (the "Funding Agreement"). [Exhibit 100 at 102]. In the Funding Agreement, TA repeated its agreement to purchase the treated wastewater from the City's new Treatment Plant over the next 20 years. This commitment, in part, provided a source of funds for repayment of a Bond issued by the City which was necessary for construction of the Treatment Plant and which further allowed the City to qualify for grant monies from state and federal sources to pay for construction of the Treatment Plant and a water reuse system. [*Id.*]; [R. 24333, Transcript Vol. 2, 208-11]. The Funding Agreement also benefited the City by saving it the time and significant expense it would have incurred had it been forced to discharge wastewater into the Great Salt Lake. [R. 24337, Transcript Vol. 6, 1492, 1498-99 (irrespective of Overlake, the City needed a new wastewater treatment plant, and the agreement with TA provided the "best cost benefit alternative")]. In sum, the City most likely would not have been able to afford its much-needed Treatment Plant but for TA.

In July of 1996, TA began constructing the infrastructure needed to support Overlake. At the time, the City's building inspector and engineer discussed with TA that the north side of 2000 North (which TA was building to connect to its first plat of

residential lots [*see* Map, Exhibit 681, attached hereto as Addendum F]) would not need to be improved until development occurred on the adjacent land, which was not owned by TA. More importantly, the City agreed that the south side of 2000 North (even though it was owned by TA) did not need to be fully improved[8] at the time because the adjacent land was not being developed at that time. [R. 24333, Transcript Vol. 2, 273-74, 320]. Similarly, Mayor Pendleton agreed that full street improvements were not required to be built on the west side of 400 West as part of a subdivision known as "Plat 1B" because it was unclear at that time what was going to be done with the adjacent property. [*Id.* at 285-87]. These agreements were consistent with the City's policy at the time. [R. 24334, Transcript Vol. 3, 700-05].

On October 3, 1996, the parties entered into a Bond Agreement for Overlake Phases 1A and 1B. [Exhibit 220]. The purpose of the Bond Agreement was "to guarantee the proper completion of the improvements and the payment of the Fees covered" and "to avoid the harmful effects" of improperly completed, undeveloped, and/or unproductive infrastructure and improvements. [Exhibit 220, ¶ 2]. In essence, if TA failed to complete public improvements to the City's satisfaction, the City was provided with a built-in mechanism to cure the failure (i.e., "calling" the bond and using the proceeds to pay for completing the public improvements). TA also conveyed to the City a Trust Deed on real property owned by TA to secure TA's performance under the Bond Agreement. [Exhibit 220]. Under the Bond Agreement, the parties agreed that "should [TA] Fail to Perform its responsibilities . . . in any degree, [TA] agreed to

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[8] "Public improvements" for these streets are curbs, gutters and/or sidewalks.

compensate CITY for all costs, including incidental Costs, related to [TA] Failure to Perform its obligations . . . to the extent that such costs are not adequately covered by the [funds recovered from the sale of the security]." [Exhibit 220, ¶ 10]. The Bond Agreement and the Trust Deed (as security) were approved by the City Attorney and the City. [Exhibit 220, signature page]. The Bond Agreement was amended as various phases of the Overlake Development were approved. [Exhibits 267, 268, 282, 293, 449].

Upon receiving final plat approval, in November 1996, TA began construction of the first plat of residential lots - Phase 1A for 55 lots. [Exhibit 192, Plat for 1A]; [R. 24333, Transcript Vol. 2, 267-68]. To accommodate the City's immediate need for the new Treatment Plant, and with the expectation of soon having a comprehensive development agreement with the City, TA conveyed the 30-acre site to the City for the Treatment Plant in August, 1997, without any payment from the City.

To determine whether there would be adequate culinary water for the Overlake project at build-out, Gerald Webster, the City's Engineer, prepared calculations of the City's culinary water rights and water resources, and determined the City had more than enough culinary water and culinary water rights for the full development of Overlake. [Exhibit 551]. Those calculations were furnished to the City Council, other City officials and TA in August 1997 and were relied upon by TA in binding itself to significant obligations to the City related to Overlake. [*Id.*; R. 24333, Transcript Vol. 2, 236-37].

A few months later, on December 18, 1997, TA and the City entered into a comprehensive "Development Agreement for Overlake Project Area" (the "Development

Agreement"). [Exhibit 100]. The City received numerous benefits from TA under the Development Agreement, including, but not limited to the following:

- All of the benefits derived from the Annexation Agreement and the Funding Agreement which were incorporated into the Development Agreement.
- Water rights for approximately 686 acre feet of water.
- One-half of the cost of extending the main trunk lines for culinary water.
- Easements for a variety of purposes.
- The commitment from TA to purchase up to 2.25 million gallons per day of the Treatment Plant's treated wastewater over the next 20 years.
- TA's payment of water, park and sewer impact fees.
- TA's donation of 30 acres for the Treatment Plant.
- TA's agreement to construct and maintain all sewer lift stations in Overlake.
- Improvements of streets, curb, gutter and sidewalks in Overlake.
- TA's commitment to sell to the City up to 150 acres of park sites in Overlake at the greatly reduced price of $5,000 per acre.
- Construction of the 18-hole Overlake Golf Course, for public use.
- TA's commitment to donate 7 acres to the City for public facility sites.
- TA's commitment to set aside 97 acres for purchase by the Tooele County School District.
- TA's commitment to donate 66 acres for construction of 17 storage lakes needed to store treated wastewater from the new Treatment Plant.

[Exhibit 100].

In exchange for the many benefits provided by TA, the City undertook the obligation of providing all required culinary water to Overlake:

> A. Water Provided By the City. In consideration, and as a requirement for Annexation of the Overlake Project Area, [TA] has conveyed to the City

perfected water rights for 686 acre feet of culinary water. As the demand for culinary water [ ] required to meet the culinary water needs of the Overlake Project Area at eventual build-out is anticipated to exceed the Water Rights being conveyed to the City by [TA], *the City is willing to take all reasonable actions necessary to provide*[9] *the culinary water required to meet the needs of the Overlake Development Plan at build-out, including but not limited to water rights, water source development, storage capacity, and major distribution line capacity.*

B. Reservation of Water Capacity. The City *shall take all reasonable actions to provide sufficient availability and capacity of culinary water necessary to allow the completion of the Overlake Development Plan.*

[*Id.* §§ VI.1.A-B (emphasis added)].

The City's representations that public improvements in Overlake had been accepted as complete.

From 1996 to 2001, TA developed plats in Overlake, including Phases 1A, 1B, 1C, 1D, 1E, 1F, 1G and 1J. [Pre-Trial Order, Uncontroverted Facts § IV.C.xii]. With respect to Phases 1A, 1B, 1C and 1G, an engineering firm, Forsgren Associates, Inc. ("Forsgren"), performed all inspections during construction of public improvements for the City (but paid by TA).[10]

On December 8, 1997, Forsgren delivered a letter to City Engineer Webster, stating that the improvements in Phase 1A were complete [Exhibit 114], and delivered an almost identical letter regarding the improvements in Phase 1B three weeks later. [Exhibit 123]; [R. 24335, Transcript Vol. 4, 758-59]. Webster "certified" that the 1A and

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[9] The City's obligation to "provide" culinary water for no charge is contrasted with its obligations to "sell" other types of water, such as wastewater. [Exhibit 100, ¶ V.1.A, E].

[10] [Exhibits 109, 113]; [R. 24339, Transcript Vol. 8, 2019, 2039 (the City entered an agreement with TA wherein TA would pay Forsgren to be responsible to essentially act as the City's inspector)]; [R. 24337, Transcript Vol. 6, 1515].

1B improvements were complete by signing the second page of the letters stating that: "I accept on behalf of Tooele City the wet utilities, roadway surface and curb and gutter in [Phase 1A/Phase 1B] Overlake Development." [Exhibits 114, 123]. Subsequently, the designated City Inspector issued passing inspection reports for the improvements in Phases 1A and 1B. [Exhibit 124].

Accordingly, in December 1998, TA and the City entered into an "Amendment to Bond Amendment" which reduced the bond amount for Phase 1B to the 20% warranty level, which could not have occurred unless the Phase 1B improvements were complete. [Exhibit 108 at 6]; [Exhibit 625 §§ 7-19-12 and 7-19-35]. On November 19, 1998, the City Inspector issued a passing inspection report for subdivision 1C also certifying that the public improvements in 1C were complete. [Exhibits 138, 140].

On September 22, 1999, TA received a letter from Curt Morris, the Assistant City Attorney whom it had been instructed to work with, addressing the City's "position" regarding the status of building permits and phased development of subdivisions, and the effect on Overlake. [Exhibit 25]. Mr. Morris concluded in the letter that "[t]he public improvements are considered to be complete" for Phases 1A, 1B and 1C. [*Id.* at 2-3]. Mr. Morris repeated these representations by signing additional letters and making notes that the improvements had been accepted in November 1998 and by stating that the bond amount required for subdivisions 1A, 1B and 1C would be reduced to "20% until final warranty inspections" indicating that the bonds would be reduced to warranty level. [Exhibit 127]; [R. 24341, Transcript Vol. 10, 2463-64].

In sum, during the first few years of development, TA invested approximately $10 million in public improvements in Overlake [R. 24333, Transcript Vol. 2, 325-26], and City representatives, including the Engineer, Inspector and City Attorney, assured TA that the public improvements constructed as of that time were accepted as complete.

The City's Antagonism toward Overlake and the City's Material Breaches of its Contractual Obligations.

As described above, the City and TA initially worked cooperatively to move the development of Overlake forward. However, on January 1, 1998, the City's administration changed when Charlie Roberts became the new Mayor [R. 24332, Transcript Vol. 1, 134] approximately three weeks after the Development Agreement was executed. Under Mayor Roberts, the City adopted a new "slow-growth" policy to restrict residential development within the City and, critically, proposed an ordinance limiting the culinary water commitments of the City to Overlake and other residential development projects. [Exhibit 553]; [R. 24333, Transcript Vol. 2, 182-83, 248-54]; [R. 24334, Transcript Vol. 3, 457].

While the City took the significant benefits of each of its agreements with TA, after 1998 (and worsening over time) the City's new administration engaged in a systematic pattern of depriving TA of the benefits TA was to enjoy under those agreements, especially the water rights that the City desired to allocate to commercial development. [*See* footnotes 11-17 infra; R. 24333, Vol. 2, 250]. Significantly, soon after entering the Development Agreement, new surveys and studies conducted by the City revealed that the City was not in as good of a position regarding culinary water

rights as it previously thought, receiving estimates that "if the population continues to increase as predicted, the City will not have enough water associated with their existing municipal water rights to meet its needs by 2011" and discovering that the "waters of Tooele Valley are considered to be fully appropriated." [Exhibit 561 ¶¶ 13-14]; [Exhibit 553]. The City determined it would rather use its water resources for commercial development instead of fulfilling its commitments to Overlake. [Exhibit 561 ¶ 11; R. 24333, Vol. 2, 249]. Accordingly, performance of the Development Agreement would become increasingly burdensome for the City as its water increased in value over time – estimated (at the time of trial) at over $15,000 per each new lot approved for development. [R. 24334, Transcript Vol. 5, 1083-87]; [R. 24339, Transcript Vol. 8, 1980-84]; [R. 24334, Transcript Vol. 3, 646]; [Exhibit 562].

The City's change of attitude affected most City officials and staff, making it extremely difficult, and in some instances almost impossible, for any progress to take place in Overlake. In nearly all of its dealings with the City after 1999 TA faced conflict and antagonism from the City, including:

a. The City not acting on requests submitted by TA in a timely fashion;[11]

b. The City refusing to conduct or continue meetings necessary for development and refusing to provide complete "punch lists" for the improvements[12]

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[11] [R. 24334, Transcript Vol. 3, 443 (City waited five months to respond to the request for an extension)]; [R. 24333, Transcript Vol. 2, 364 (City waited over eighteen months to respond to requests for approval of assignment of Development Agreement)]; [Exhibits 114, 117 (City Council adopted a resolution that improvement of Phase 1A had been accepted as complete three years after advising the improvements were complete)]; [R. 24335, Transcript Vol. 4, 880-81 (a review process that typically takes three to four weeks was prolonged by the City for more than eight months)].

c. The City applying ever-changing standards to TA's public improvements required by the Development Agreement and Bond Agreement, stating it should construct improvements one way and then refusing to accept the improvements until they were constructed another way;[13]

d. The City not raising complaints regarding the public improvements at the time of construction, instead reserving its complaints for litigation;[14]

e. The City engaging in disparate treatment, harassment and imposing standards not applied to other developers;[15] and

f. The City using its governmental and police powers to undertake several actions and pass ordinances and resolutions designed to thwart TA's ability to develop additional real property within Overlake.[16]

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[12] [*Id.* at 852-53 (requested meetings not held)]; [Exhibit 156-57, 160 (requests for complete punch list never satisfied as City continually claimed it could add to the list)].

[13] [R. 24333, Transcript Vol. 2, 346-47]; [R. 24334, Transcript Vol. 3, 700-05 (contrary to City's later position, at the time of construction the City's Chief Building Official and Director of Community Development understood that the City did not require full road width construction on collector streets in order for improvements to be accepted, nor was acceptance conditioned on council approval)]; [R. 24335, Transcript Vol. 4, 755-57 (the City changed its standards; the City inspector first instructed that no improvements were required at the time on the west side of 400 West, but subsequently changed the requirement, demanding that improvements be completed before additional plats would be approved)]; [R. 24338, Transcript Vol. 7, 1810-11 (City created new development requirements after this suit was filed which were not in the Development Agreement and were not required when Phases 1A-1J were approved)].

[14] [R. 24340, Transcript Vol. 9, 2383]; [R. 24341, Transcript Vol. 10, 2648 (City did not reduce its claims regarding incomplete street improvements to writing until around time litigation commenced)]; [R. 24341, Transcript Vol. 10, 2620-24 (despite City's claims in litigation, former City inspector assigned to Overlake was unable to identify anything that TA failed to do which harmed the City, concluding: "they done [sic] a good job")].

[15] [R. 24333, Transcript Vol. 2, 329-33, 336-45]; [R. 24338, Transcript Vol. 7, 1808 (inconsistent enforcement of standards)]; [R. 24335, Transcript Vol. 4, 863-67 (City required a Master Plan of all 7,000 lots left in Overlake before processing a plat for 183 additional homes, which requirement would cost hundreds of thousands of dollars, had not been requested in the past, and was not required of other developers)]; [R. 24337, Transcript Vol. 6, 1437-39 (disparate treatment)].

It was not until after trial that the City claimed the Development Agreement was to receive the "death penalty" due to certain incomplete public improvements – several of which the City had previously represented were complete as of November 1998 [Exhibit 132, "Overlake Subdivision Completion Deficiencies" dated October 12, 2005]; [R. 24333, Transcript Vol. 2, 309-16]. The City asserted this claim even though it never called TA's bonds to complete the public improvements.[17] [R. 24339, Transcript Vol. 8, 1960]. The City took no action to enforce the Bond Agreement (which was a built-in mechanism to complete or cure any alleged problems with the public improvements), nor did the City otherwise act in a manner consistent with its later claim that TA breached the Bond Agreement. The City sought to justify (or be excused from) its numerous breaches of the agreements by asserting an argument contrived - after the fact - that TA had failed to complete public improvements.

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[16] [R. 24335, Transcript Vol. 4, 873-74 (after adopting a resolution that the City would allow development of property owned by third parties if the application was submitted by, and property developed by, TA, the City adopted a contradictory resolution that it would not be receptive to requests of TA to develop properties owned by third parties)]; [Exhibits 332, 517 (the City passed a resolution denying the requested assignment of portions of the Development Agreement without providing TA or Perry companies notice of the City Council meeting at which the resolution was adopted, and without requesting information necessary to consider the assignment)]; [R. 24333, Transcript Vol. 2, 395]; [R. 24334, Transcript Vol. 3, 420-21]; [R. 24335, Transcript Vol. 4, 830-31].

[17] Despite the City's claims at trial that it was "concerned" with the security of the trust deed bonds approved by the City Attorney the City never investigated its "concerns" to determine if the City was under-secured, never requested a subordination agreement, never requested a substitute bond, and otherwise failed to take any action demonstrating that the City's "concerns" were real. [R. 24339, Transcript Vol. 8, 1960-71].

The Jury Verdict

In rendering the Verdict, the Jury was asked to follow and apply 69 Jury Instructions. [R. 22172-22271; Addendum B hereto]. The jurors also answered 33 questions on a form labeled "Special Verdict Form" (the "Verdict"), 29 of which were mixed questions of law and fact in which the Jury was asked to apply the law to its findings of fact (only four questions were purely factual determinations). [R. 22161-22168] [Addendum C hereto].

In the portion of the Verdict dealing with TA's claims and the City's defenses the Jury found that the City materially breached the Development Agreement and the Covenant of Good Faith and Fair Dealing, each in eight specific ways. [R. 22162-22164, Verdict Question 1]. The Jury also found that TA materially breached the Development Agreement in two ways,[18] but that the City had waived its claims and defenses for such material breaches. [R. 22164-22165, Verdict Questions 2(b), 2(e) and 3].

In the portion of the Verdict dealing with the City's claims, the Jury found that TA failed to fully complete public improvements, but did not find that such failure was a material breach of the Development Agreement or the Bond Agreement. [Id. Questions 2(a), 6 and 7]. The Jury found that the City should be compensated for the improvements

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[18] The Jury found that TA materially breached the Development Agreement "by failing to comply with the requirements for the approval of subdivision plats and site plans and all other applicable ordinances, resolutions, policies, and procedures of Tooele City, pursuant to Sections III.G and XVII of the Development Agreement . . ." and for "failing to pay amounts owed for water used to irrigate the Overlake Golf Course...." Crucially, the Jury specifically found that TA did not commit a material breach for any alleged failure to complete public improvements. [*See* R. 22164, Verdict Question 2(a)].

that TA failed to fully complete, i.e., the difference between substantial performance and complete performance. [Id. Questions 9-10].

Accordingly, the Jury found the City's material breaches caused $22.5 million in damages to TA, and that the cost to fully complete the public improvements that TA had substantially completed is $1.75 million.[19] [R. 22161-22168, Questions 4-5, 9-10]. Prior to excusing the Jury the District Court did not suggest that the Verdict was inconsistent or send the Jury back for further deliberation. Likewise, neither party objected to the Verdict or suggested it was inconsistent. [R. 24343, Transcript Vol. 13, 2964-66].

After substantial briefing and three hearings the District Court issued a 45-page Memorandum Decision and Order ("Memorandum Decision"), concluding that "the findings of the jury are irreconcilably inconsistent," striking the Verdict, and declaring a mistrial. [R. 24264-24310] [Addendum A hereto].

In addition to analyzing the alleged inconsistencies in the Verdict, the District Court ruled that despite TA's alternative argument that the Verdict should be construed as a general verdict with interrogatories pursuant to Rule 49(b) of the Utah Rules of Civil Procedure, the Verdict should be interpreted as a special verdict under Rule 49(a). [R. 24276-24277]. Further, in a section of its analysis titled "[t]he Intent of the Drafters is

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[19] The $1.75 million does not reflect the City's evidence of the alleged cost to finish the remaining improvements which was only $550,000 (approximately 2.7% of the amount put into Overlake). [R. 24342, Transcript Vol. 11, 2910]. The Jury was presented conflicting evidence as to the value of the Trust Deed Bond due to first and second position deeds which were implied to have been paid down or paid off but the obligation that would have been ahead of the City in priority was about $1,200,000. [R. 24339, Transcript Vol. 8, 1965-73]. The Jury's $1.75 million award to the City was the appropriate amount to satisfy both the City's unsubstantiated bond concerns and to take the public improvements from substantial completion to full completion.

Immaterial to a Resolution of the Inconsistency," the District Court noted that its efforts to harmonize the Verdict required an examination only of what was before the Jury as part of their deliberations. [R. 24290].

SUMMARY OF THE ARGUMENT

It is the obligation of a court to protect the right to a jury trial by harmonizing a jury verdict if at all possible. If there is any way to view a case that makes the jury's answers to the verdict consistent with one another, the court must resolve the answers that way, even if the interpretation is strained. Here, the Verdict can be harmonized, without even straining, as follows:

(1) The Jury found that both parties breached the agreements (the City materially breached the Development Agreement and the Covenant of Good Faith and Fair Dealing, and TA committed both non-material and material breaches of the Development Agreement and a non-material breach of the Bond Agreement) [R. 22162-22166, Questions 1, 2, 6 and 7];

(2) The Jury found that the City waived its claims and defenses that TA materially breached the agreements [R. 22165, Question 3];

(3) As a result of the City's eight material breaches of the Development Agreement and the Covenant of Good Faith and Fair Dealing, the City caused $22.5 million in damages to TA [R. 22162-22166, Questions 1, 3-5]; and

(4) Even though the City waived its claims and defenses of TA's material breaches of the agreements, the Jury intended that the City receive the difference between TA's

substantial performance and complete performance of the public improvements ($1.75 million) [R. 22166-22167, Questions 6-10].[20]

Alternatively, the Court erred in ruling that the Verdict should be interpreted under Utah Rule of Civil Procedure 49(a), rather than Rule 49(b), because the Jury not only performed the function of fact-finder, but also made ultimate conclusions of liability and applied 69 Instructions to resolve mixed question of fact and law. In ruling that the Verdict is to be interpreted under Rule 49(a), the District Court erred when it focused on the title of the Verdict form and the litigants' intent to label the Verdict as a "special verdict," without considering the Jury's actual function in this case. The Jury was instructed by the District Court to find facts and apply the law, which it did in rendering ultimate conclusions of liability on issues such as breach of contract and waiver. Accordingly, the Verdict is more akin to a general verdict with interrogatories under Rule 49(b), rather than a special verdict limited to findings of fact under Rule 49(a). As a "general verdict," TA clearly prevailed and should have been entitled to judgment.

Finally, the District Court erred in making the City's "death penalty" argument regarding the application of Paragraph 18 of the Bond Agreement central to its conclusion that the Verdict is irreconcilably inconsistent. The City's "death penalty"

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[20] While $1.75 million is not a small sum of money, it is not "substantial" in light of the totality of the Overlake project. The sum must be considered in context, as it accounts for less than 8% of the damages that the City inflicted upon TA, approximately 17% of the $10 million that TA already spent substantially completing the public improvements, less than 9% of the $20 million already put into Overlake [R. 24333, Transcript Vol. 2, 325-26], and an almost infinitesimal fraction of the total Overlake project.

claim or defense was not submitted to the Jury, and should not be included in the harmonization analysis.

Accordingly, this Court should find that the Verdict is consistent, reverse the District Court's order, and remand with instruction to enter the harmonized Verdict as a judgment in favor of TA.

ARGUMENT

I. THE VERDICT IS CONSISTENT AS A MATTER OF LAW.

A. If a Verdict Can be Read Harmoniously, Even if Such Reading is Strained, it Must be Harmonized and Judgment Entered Upon it.

The right of a jury trial in civil cases is guaranteed by Article I, § 10 of the Utah Constitution. *Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418, 421 (Utah 1981). To protect this substantial right, a court must, whenever possible, read a jury verdict as being harmonious and enter the verdict rendered. *Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078, 1083 (Utah 1985) ("Where the possibility of inconsistency in jury interrogatories or special verdicts exists, the courts will not presume inconsistency; rather, they will seek to reconcile the answers if possible . . . . If the jury's answers can be read harmoniously, *they must be read harmoniously.*") (emphasis added). "It is not enough that the verdicts appear to be inconsistent. Rather, the verdicts must be both inconsistent and irreconcilable for [a] court to remand for a new trial or otherwise overturn the jury's verdicts."[21] *Holbrook v. Master Prot. Corp.*, 883

[21] "Presumptions and intendments cannot be indulged in to establish a contradiction or inconsistency in the findings or answers of a jury to special interrogatories, the

P.2d 295, 299 (Utah Ct. App. 1994). In sum, there is a tremendous presumption in favor of preserving jury verdicts and entering judgments reflecting the jury's overall intent.

B. Tooele Associates' Interpretation Harmonizes the Verdict and Should be Adopted.

i. The Verdict is Consistent.

The first step in the harmonization analysis is to consider the plain language of the Verdict. TA's interpretation of the Verdict (*see* page 18 above, in the "Summary of the Argument") is consistent with the Verdict's plain language.

A key issue is whether the answer to Question 3 of the Verdict (where the Jury found that TA proved "Tooele City waived its claims and defenses, as stated in Question 2, that [TA] *materially breached* the Development Agreement and/or Bond Agreements"[22]) can be read harmoniously with the answer to Question 8 (where the Jury further found that TA did not prove "that Tooele City waived its rights to claim that [TA] *did not complete public improvements* in Overlake required by the Development Agreement and the Bond Agreements"). (Emphasis added). This issue is easily resolved by reading Question 8 as it is written – that the City did not waive "its rights to claim that [TA] *did not complete public improvements* in Overlake required by the Development Agreement and Bond Agreement" – rather than by taking it a step further and inserting

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presumption being always to the contrary." *Weber Basin Water Conservancy Dist. v. Nelson*, 358 P.2d 81, 83 (Utah 1960).

[22] The phrase "and/or Bond Agreements" was added to Question 3 so that in the event Question 3 was answered "Yes," the City's claims and defenses under the Bond Agreement were both waived. [*See* R. 24341, Transcript Vol. 10, 2745-47]; [R. 24342, Transcript Vol. 11, 2824-26].

language that the City has not waived claims of *breach* of the Development Agreement and Bond Agreement. (Emphasis added).

Presumably, the Jury read the plain language of Question 8, which is silent as far as "breach," as only asking whether the City waived its right to recover the cost to complete the public improvements, i.e., the difference between substantial performance and complete performance. By answering "no" to Question 8 and awarding the City the cost of completing the improvements under the Bond the Jury found that even if the City waived its claims and defenses of material breaches of contract TA should still fully perform its contractual obligation (to bring the public improvements from substantial completion to full completion).[23] Question 3 is the only question expressly addressing whether the City waived its claims and defenses of material *breach* of either the Development Agreement or the Bond Agreement. The Jury's answer does not conflict with any other answers on questions regarding waiver. The Court is not required to delete the "or" from "and/or Bond Agreement" in order to harmonize the response to Question 8 with any other response in the Verdict.

This interpretation is supported by the Jury Instructions, particularly the following:

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[23] The District Court's interpretation was that the Jury found the City also waived its claims of non-material breach of the Development Agreement related to incomplete public improvements. [R. 24301 ("The jury further found that Tooele City had proven non-material breaches of the Development Agreement, by failing to complete public improvements, SVF Section II, Question 7(d), but these non-material breaches are waived by the operation of the jury's finding to SVF Section I, Question 3.")]. Regardless of whether non-material breaches were waived by Question 3, the Jury intended the City to be awarded completion damages under the theory of substantial performance. Further, the Jury specifically found that TA's alleged failure to complete the public improvements was not a material breach. [Verdict Question 2(a)].

Jury Instruction 30: Material Breach. You must decide whether there was a material breach of the Development Agreement . . . **A breach is not material if the party's failure was minor and could be fixed without difficulty.** [R. 22204 (emphasis added)];

Jury Instruction 31: Partial Breach. If one of the parties to a contract did some but not all of the things it promised to do under that contract, then the other party may **recover damages related only to what the party failed to do under the contract.** [R. 22205 (emphasis added)];

Jury Instruction 35: Substantial Performance. [TA] claims that even though it did not do everything exactly as the Development Agreement required, it substantially performed the Development Agreement, and **therefore, is entitled to a ten-year extension of the Development Agreement's term and to recover from Tooele City . . . [TA] can only recover under the Development Agreement if it substantially performed all of its obligations under the terms of the Agreement.**

[TA's] failure to do everything exactly as promised under the Development Agreement does not prevent it from recovering damages unless (1) it willfully departed from the terms of the Development Agreement; (2) it acted in bad faith; or (3) its variance from the strict and literal performance of the Development Agreement involved more than **technical or unimportant omissions or defects**. [R. 22209 (emphasis added)];

Jury Instruction 63: Performance Excused by Material Breach. Tooele City contends that it was excused from performing its remaining obligations under the Development Agreement because of [TA's] conduct in failing to complete public improvements. In order to establish this as a justification for not performing Tooele City's remaining obligations under the contract, Tooele City must prove that [TA] breached an important part of what [TA] had promised to do. . . . **That is, Tooele City would be excused from performing if [TA's] conduct in failing to complete public improvements related to an essential part of the Development Agreement.** On the other hand, **if [TA] breached only a minor or unimportant part of the Development Agreement, Tooele City would not be excused from performing.**

* * *

. . . **If you find that [TA's] conduct was unimportant in relation to what [TA] had promised to perform, you must find Tooele City was required to continue to perform, although Tooele City may still be entitled to compensation for the breach.** [R. 22265 (emphasis added)].

Interpreting the responses to the Verdict questions with the Jury Instructions it is clear the Jury found that TA's failure to fully complete the public improvements was a "technical or unimportant omission or defect," was "minor and could be fixed without difficulty," and was not a willful act or done in bad faith. Rather, it was the result, at least in part, of the City's "active interference." Otherwise, the Jury would not have found TA's breach to be non-material which would have excused the City's performance. [*See* R. 22162-22164, Questions 1 and 2(a) (in which the Jury did not excuse the City's performance and expressly found that TA's failure to complete public improvement was not a material breach)].

The Jury was further instructed that TA's failure to do everything exactly as promised did not prevent it from recovering damages from the City, which is consistent with the Jury's damage award against the City of $22.5 million even though the Jury found that the public improvements were not fully completed. [R. 22165-22166]. The Jury's finding that the City should still receive $1.75 million for incomplete improvements is explained by the "partial breach" and "performance excused by material breach" instructions that the Jury may award the City "damages related only to what [TA] failed to do under the contract," even if TA's deviation from the public improvement requirements of the agreements was minor and not enough to excuse the City's continued performance. [R. 22167]; [R. 22205, 22265, Instructions 31, 63].

The substantial performance instruction (Instruction 35) is the key to making sense of the Verdict. The Jury could not have found that TA should recover $22.5 million in damages, that TA was entitled to a ten-year renewal of the Development Agreement, that

TA was entitled to assign a portion of the Development Agreement to another party and that the City materially breached the Development Agreement by refusing to approve applications for new subdivisions unless it concluded that TA had substantially performed its obligations and was entitled to continued performance from the City. [R. 22162-22164, Question 1]. The Jury's award of $1.75 million to the City to complete public improvements (a curable, non-material breach of the Development Agreement and Bond Agreement) is consistent with the Jury's finding of substantial performance.

Prior to trial the District Court determined that the issue of whether or not TA substantially performed the agreements was to be resolved by the Jury. [R. 20834 ¶ 3]. While the drafters' intent is not controlling to a Verdict harmonization analysis, the parties and the District Court presented the issue of substantial compliance/performance to the Jury by way of Question 1(c): If the Jury found that TA was in substantial compliance, then the Jury would determine the City's denial of the extension was a material breach, but if the Jury found that the extension denial was not a material breach, it would find that TA had not substantially complied. [*See* R. 24341, Transcript Vol. 10, 2768-71].[24] Thus, because the Jury found the City's denial of the extension was wrongful and a material breach, it necessarily follows that the Jury found TA substantially complied/performed. [R. 22162, Question 1(c)].

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[24] Deleting a separate question on substantial compliance/performance, arguing: "it's really part of the extension argument . . . If we are in substantial compliance as of 12-17-07, then essentially by definition the denial of the extension was wrongful." Both the District Court and counsel for the City agreed that the question of substantial compliance would be most properly addressed by asking whether the failure to extend the Development Agreement was a material breach. [R. 24341, Transcript Vol. 10, 2768-71].

In sum, the Verdict is consistent. By answering "yes" to Question 3 the Jury found that the City waived all claims and defenses that TA materially breached the agreements, meaning the Jury found the City's performance was not excused and that TA is entitled to recover damages. This is also consistent with the Jury's finding that the City engaged in bad faith and "actively interfered" in TA's efforts to complete the public improvements. [R. 24302-24303]. By answering "no" to Question 8, the Jury found that the City preserved the right to claim and receive compensation for the cost of fully completing the public improvements – i.e., the difference between substantial and complete performance – which was expressly permitted by the Instructions. When interpreted with the Instructions, this view not only renders the Verdict consistent on its face, but also confirms that each answer on the Verdict was deliberate, reasoned, and reflective of the Jury's intent that both parties be made whole by awarding TA $22.5 million in damages, while also ensuring the public improvements would be completed.

ii. Any Interpretation of the Verdict Which Preserves the City's Breach of Bond Agreement Claims Cannot be Reconciled with the Jury's Factual Findings and Overall Intent.

The District Court correctly concluded that the theory that the City preserved its claims and defenses of material breach of the Bond Agreement cannot be reconciled with the Jury's specific factual findings that the City "actively interfered" with TA's completion of the public improvements:

> The City's argument that a consistent reading of the SVF Section I, Question 3 and SVF Section II, Question 8 leaves Tooele City's claims for breach under the Bond Agreement still viable, vitiates any jury finding on these specific issues related to the public improvements. The jury was instructed in Jury Instruction 33 that 'Tooele City cannot by a willful act

> or omission make it difficult or impossible for TA to perform under the terms of the Development Agreement or the Bond Agreement. . . .' Tooele City cannot actively interfere with [TA's] ability to complete the public improvement as these findings in Section I clearly seem to indicate, and then receive the benefit of such a breach, or a defense, under the Bond Agreement that failure to complete public improvements is a breach by [TA]. Such a result is inequitable and contrary to the obligations of parties under covenants of good faith and fair dealing.

[R. 24303]. The findings of "active interference" by the District Court refer to the Jury's findings that the City materially breached the Development Agreement and the Covenant of Good Faith and Fair Dealing in the following ways related to public improvements:

- By "requiring [TA] to complete public improvements to standards that are not found within the Development Agreement, the approved construction drawing, the Bond Agreement or the City's Ordinances and or that are not required of other similarly situated developers" [R. 22163, Question 1(h)];
- By "slowing or refusing to give final inspections of the public improvements" [*Id.*, Question 1(e)];
- By "misinterpreting and misapplying its own public improvement ordinances in relation to the Overlake Project Area's subdivisions" [*Id.*, Question 1(f)]; and
- By "refusing to recognize and accept its own admissions that public improvements within the Overlake Project Area's subdivisions were complete" [*Id.*, Question 1(g)];

The District Court further concluded that the Jury was not presented with information allowing it to make a reasonable distinction between the waiver of breach of contract claims or defenses based upon the public improvement requirements of the Development Agreement and the Bond Agreement, as argued by the City:

> . . . the obligations are similar in nature, to reach the conclusion that the jury made a distinction between the two when it comes to the obligation of performance or breach is a difficult and tenuous distinction. While it may very well be a distinction with a difference, public improvements,

> and their completion are common to both the Development Agreement and the Bond Agreement. Such a commonality makes it difficult for the Court to have any confidence that the jury was able to distinguish between the two in the contested fashion that would render the jury's findings consistent.

[R. 24306].

The District Court's point is well-founded as neither the Verdict nor the Jury Instructions distinguish the public improvement requirements of the two agreements or provide any logical basis for finding that the City preserved a claim of breach based on incomplete public improvements under one agreement but not the other. The Instruction on the City's claims of breach, as proposed by the City, did not differentiate between the various agreements, instructing:

> Tooele City claims that [TA] breached the Development Agreement and its amendments, the Annexation Agreement, and the Bond Agreements and their amendments by not performing its obligation as follows: 1. By failing to complete the public improvements in each phase of the Overlake development, except for Phase 1A, in accordance with the terms of the Annexation Agreement, the Development Agreement and its amendments, and the Bond Agreements and their amendments....

[R. 22201, Instruction 27].

There was no evidence at trial that the public improvements required of the Bond Agreement are different in any way from the public improvements required by the Development Agreement. Both agreements required construction of public improvements illustrated on the same documents. [R. 24305-06]. However, the City applied amorphous policies and procedures which were not included in the documents governing the timing and manner for completing the improvements. [R. 22163, Question 1(a)]. Even if there were any differences between the public improvements required

under the two agreements, the Jury found that the City was holding TA to standards that were "not found within the Development Agreement, the approved construction drawings, the Bond Agreements or the City Ordinances." (Emphasis added); [R. 22163, Question 1(h)]. In other words, the Jury determined the City was "hiding the ball" and making it unreasonably difficult for TA to satisfy the ever-changing demands of the City to have the improvements deemed "complete." Id.

Hence, there is no basis for a distinction between the requirements of the Development Agreement and the Bond Agreement. Further, since the Jury found that neither agreement provided TA with the standards necessary to "complete" the public improvements, the Jury could not have found that the City preserved its claims of breach under either agreement, let alone one but not the other (as the City argues).

The City further argued that if its claim for breach of the Bond Agreement is preserved by Question 8, then, based on the finding of non-material breach of the Bond Agreement in Question 6, the City was authorized to kill the Overlake project. The City bases its argument on a pre-trial ruling (which was not made known to the Jury) regarding Paragraph 18 of the Bond Agreement.[25] Not only did the City fail to bring this argument of the alleged "death penalty" of the Bond Agreement to the Jury's attention

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[25] The City did not reveal to the Jury that it claimed Paragraph 18 of the Bond Agreement gave the City the right to permanently withhold all future development and prevent TA from recovering any damages which the Jury might determine the City inflicted upon TA. The City cannot after trial suggest that the finding of waiver does not apply to the one particular defense it chose not to disclose to the Jury. By all appearances, since the argument was raised for the first time after trial, the City did not even conceive of the so-called "death penalty" argument under Paragraph 18 of the Bond Agreement until after trial, in a desperate attempt to avoid enforcement of the Jury's award of damages to TA.

(by way of evidence, Jury Instruction or Verdict question), but it represented to the Jury that the incomplete improvements "[are] not [the] central theme of our case." [R. 24332, Transcript, Vol. 1, 105 (representing that the theme of the City's claims is that TA was playing "catch me if you can," not that TA should be precluded from obtaining any relief due to minor breaches)]. After trial, the City argued that the Jury's findings authorized it to deny future development, thereby preventing TA from any and all future development and precluding an award of any damages to TA.

The City's argument that the Jury's findings preclude TA from commencing the development of new subdivisions in Overlake is contrary to the Jury's express finding that the City's refusal of applications to develop new subdivisions or phases was wrongful and done in bad faith. [R. 22163, Question 1(i)].[26] The City's argument also contravenes the Jury's determination that the term of the Development Agreement should be extended for TA's benefit. [R. 22163, Question 1(c)]. Since the City did not present the Paragraph 18 "death penalty" claim/defense to the Jury, the Jury had no basis to determine whether the same action could be a material breach of the Development Agreement but not a breach of the Bond Agreement.

In sum, any interpretation of the Verdict that concludes the City preserved its claim that TA breached the Bond Agreement or that the Bond Agreement can be invoked as a "death penalty" to TA's claims is contrary to the Jury's express findings that:

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[26] "Has [TA] proven by a preponderance of the evidence that Tooele City materially breached the Development Agreement including its implied covenant of good faith and fair dealing . . .[**b]y refusing to approve, and threatening refusal of, applications for the creation of new subdivisions within the Overlake Project Area**? [Answer:] **Yes**" (emphasis added).

- The City wrongfully and "actively interfered" with TA's completion of the public improvements [R. 24302-24303; Questions 1(e), 1(f), 1(g) and 1(h)];

- The City acted wrongfully and materially breached the Covenant of Good Faith and Fair Dealing when it refused applications for new subdivisions within Overlake [R. 22163; Question 1(i)];

- The term of the Development Agreement should be extended as requested by TA [R. 22163, Question 1(c)];

- The City waived identical claims of material breach of the Development Agreement which were indistinguishable from the City's claims under the Bond Agreement; therefore, there is no justification for a finding of waiver of breach of one agreement but not the other [R. 22164-22166];

- The City was not excused from its contractual obligations and is liable for $22.5 million in damages it caused to TA [R. 22162-22166; Questions 5(a) and 5(b)];

- TA substantially performed its obligations to the City, illustrated in part by the Jury's finding that the City materially breached the Covenant of Good Faith and Fair Dealing and the Development Agreement when it denied the request for a ten-year extension of the Development Agreement [R. 22162; Question 1(c)]; and

- TA's failure to fully complete public improvements was not a material breach [R. 22164; Question 2(a)].

iii. The "as stated in Question 2" Descriptor in Question 3 Does Not Limit the Jury's Finding of Waiver to the Development Agreement.

The descriptor "as stated in Question 2"[27] should not frustrate the harmonization analysis because it does not limit the Jury's finding of waiver of claims and defenses of material breach to the Development Agreement. There are at least two straightforward theories of interpretation which allow Question 3 to apply to both the Development Agreement and Bond Agreement, thereby reconciling the Verdict.

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[27] Question 3 asked the Jury whether "Tooele City waived its claims and defenses, *as stated in Question 2*, that [TA] materially breached the Development Agreement and/or Bond Agreements." (Emphasis added) [R. 22165].

One simple interpretation is that the descriptor "as stated in Question 2" is a reference to the actual *actions* described in the subparts of Question 2 (for example, failing to complete public improvements, and failing to comply with requirements for the approval of subdivision plats and site plans). [R. 22164-22165, Question 2]. The District Court determined that the language of the "main" questions of both Question 1 and Question 2 should "parrot" each other. [R. 24341, Transcript Vol. 10, 2742].[28] Accordingly, each Verdict question references only the Development Agreement in the body of the question but then goes far beyond the Development Agreement in addressing the various alleged wrongful actions of the parties, including claims regarding City ordinances, improvements required by the Bond Agreement, and other actions which are not technically breaches of the Development Agreement. Because Question 3 expressly applied the doctrine of waiver to the "Development Agreement and/or Bond Agreement," by answering "Yes," the Jury found that the City waived all claims and defenses of breach based on the *actions* described in the subparts of Question 2, regardless of whether the City alleged the acts to be in violation of either the Development Agreement, Bond Agreement or both agreements.[29]

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[28] Each question asks, "[h]as [one party] proven by a preponderance of the evidence that [other party] materially breached the Developments Agreement?" [R. 22162-22164] (Question 1 also added "including its implied covenant of good faith and fair dealing?").

[29] While the District Court and parties were drafting the Verdict, the City's counsel referred to Question 3 broadly as applying to waiver of the right to claim breach, without limiting the waiver to the Development Agreement, and expressly stipulated to inclusion of language for the finding of waiver of the Bond Agreement claims [R. 24341, Transcript Vol. 10, 2743 ("That was my attempt at giving them their waiver provision. Even if there's a breach, we waive.")]; [*Id.* at 2746-2747 (TA's counsel asked "[s]o could

Another harmonizing interpretation is that the parties' agreement regarding the Overlake project is memorialized and governed by a collection of contracts, plats, plans, ordinances, resolutions, policies, and procedures, many of which have overlapping requirements and which incorporate or refer to the requirements of another (and some of which were never reduced to writing). Accordingly, neither the Development Agreement nor Bond Agreement can be interpreted in isolation. (Note, for example, that while the Development Agreement contains an "integration" clause it also specifically preserves the Annexation Agreement and the Funding Agreement.)

The evidence at trial supports this interpretation. Representatives and witnesses for the City testified that the Development Agreement incorporates the Bond Agreement. [R. 24339, Transcript Vol. 8, 1934 (Q. [Mr. Hogle] Do bond agreements and compliance therewith *fall within* any provision of the Development Agreement? A. [Mr. Baker, City Attorney] I think so, yes." Mr. Baker further identifies language in the Development Agreement that "all other requirements of the City shall remain in full force and effect" as incorporating the Bond Agreement.)]. The Development Agreement is really a master agreement wherein the parties agreed to comply with the obligations set forth in their

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we add the words 'other agreements' Your Honor? I think it is important . . ." The City's counsel responded "[i]f you want to add 'or Bond Agreement' that's fine with me . . . we are saying that they breached the Bond Agreement by not completing performance, so I think their point about the Bond Agreement is well taken, and we will stipulate to add the word 'Bond Agreement' in that.")]. The City wanted to ensure that in order to answer "yes," the Jury would have had to find that *all* of the City's claims and defenses could be waived so that the Jury could "legitimately still answer no" "if one of [the City's] claims of breach survived the waiver argument." The District Court determined that the language adopted accomplished the City's purpose. [R. 24342, Transcript Vol. 11, 2826 (Counsel for the City arguing, "if one of our claims of breach survived the waiver argument, then the jury could legitimately still answer no to this ...")].

other agreements, Ordinances, Resolutions and the development documents, including the Bond Agreement.

Specifically, the requirement for construction of public improvements is common to both agreements but the Jury found that the standards are not clearly set forth in either agreement. [R. 22163, Question 1(h) (the Jury found that the City held TA to "public improvement standards that are not found within the Development Agreement, the approved construction drawings, the Bond Agreements or the City's Ordinances.")].

As such, while the Jury was asked to make findings and conclusions regarding the material breaches of the Development Agreement in Questions No. 1 and No. 2 (and later to make conclusions about non-material breaches of the Bond Agreement and Development Agreement based on incomplete public improvements in Questions No. 6 and 7) the Jury's inquiry could not have been confined to the four corners of the referenced document(s) and necessarily required the Jury to interpret several overlapping documents, regulations and ordinances[30] which, taken together, comprise the parties' agreement regarding public improvements.

For example, pursuant to Question 2, the Jury determined that "[TA] materially breached the Development Agreement,"[31] but the basis for the finding of breach went beyond the four corners of the agreement, requiring the Jury also to consider City's Ordinances, resolution, policies and procedures. [*See* R. 22164, Question 2(b) (asking

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[30] The Development Agreement itself was adopted by Ordinance 97-58. [Exhibit 1030].

[31] Both of TA's "material" breaches were waived by the City. [*See* Verdict, Question 3].

whether the Development Agreement was breached by failing to comply with the requirements for subdivision plats and site plans and all other applicable ordinances, [32] resolutions, policies and procedures of the City)].

Likewise, while the Jury found that "Tooele City materially breached the Development Agreement, including its implied covenant of good faith and fair dealing," the Jury's findings of material breach by the City were not limited to the four corners of the Development Agreement, as demonstrated by the Verdict questions themselves, including, without limitation, the following:

> Question No 1(e): "*By slowing or refusing to give final inspections of the public improvements constructed by [TA] in the Overlake Project Area's subdivision?*"

[R. 22163]. The Development Agreement did not include express requirements regarding final inspections of improvements. Instead, the requirement was incorporated by reference to City ordinances, resolutions, policies and procedures.

> Question 1(f): "*By misinterpreting and misapplying its own public improvement ordinances in relation to the Overlake Project Area's subdivisions?*"

[R. 22163]. Clearly, the Jury went beyond the four corners of the Development Agreement when it found that the City's material breaches included the City's misinterpretation and misapplication of its own ordinances.

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[32] The Bond Agreement is the product of Tooele City Ordinance 7-19-12, and is in its own right an official resolution, policy and procedure regarding Overlake. It was adopted by the City when it was executed by the Mayor, County Recorder, City Building and City Attorney. [See R. 22222-23, Instruction 44, City Ordinance 7-19-12]. Thus, the Jury's finding of City breaches of the Development Agreement by misapplying ordinances encompasses misapplication of the Bond Agreement.

> Question 1(g): "*By refusing to recognize and accept its own admissions that public improvements within the Overlake Project Area's subdivisions were complete?*"

[R. 22163]. The City's refusal to accept its own admissions regarding completion of public improvements was a breach of the Covenant of Good Faith and Fair Dealing under both the Development Agreement and Bond Agreement.

> Question 1(h): "*By requiring [TA] to complete public improvements to standards that are not found within the Development Agreement, the approved construction drawings, the Bond Agreements or the City's Ordinances and/or that are not required of other similarly situated developers?*"

[R. 22163]. Again, this question shows the Jury was required to go beyond the Development Agreement and that it made findings pertaining to other documents and ordinances – specifically including the Bond Agreement.

Upon review of the collection of agreements executed by and between the parties, as well as City Ordinances, regulations and procedures, it becomes clear that while the parties sometime referred to breach of the Development Agreement or the Bond Agreement, the agreements were not presented to the Jury in a manner which allowed for independent interpretation, particularly as to the public improvement requirements. Questions 1 and 2 refer to "material breaches of the Development Agreement," yet the subparts of these questions make it clear that the Jury was asked to make factual determinations involving more than just the Development Agreement, expressly requiring the Jury to also analyze the Bond Agreement, City ordinances, rules and regulations.

Accordingly, since Question 2 is not actually limited to the Development Agreement, the descriptor "as stated in Question 2" does not limit the waiver found in Question 3 to the Development Agreement alone.

Regardless of which theory of interpretation is adopted, it is unnecessary for the Court to "strain" to determine whether the Jury could have intended Question 3 to deal with waiver of breach of contract claims of the Development Agreement but not the Bond Agreement (under either the "as stated in Question 2" argument or the argument as to interpretation of "and/or"), because waiver of claims of breach of both agreements is a viable option and, frankly, the only interpretation that makes sense. *See Medley v. State*, 162 P.2d 881 (Okla. Crim. Ct. App. 1945) (the verdict "need not follow the strict rules of pleading, or be otherwise technical, since whatever conveys the idea to the common understanding will suffice and all fair intendments will be made to support it"). As "presumptions and intendments cannot be indulged in to establish a contradiction or inconsistency in the findings," *Weber Basin Water Conservancy Dist.*, 358 P.2d at 83, this Court should not unnecessarily interpret the "and/or" in Question 3 as an "or" when the "and" is the only interpretation by the Jury which harmonizes the Verdict, and is the interpretation that all parties, counsel and the District Court intended.

C. Because Toole Associates' Interpretation Harmonizes the Verdict, Judgment Must be Entered Upon the Verdict.

The Jury's harmonized findings are simplified as follows:

(1) The Jury found that both parties breached the agreements: the City materially breached the Development Agreement and the Covenant of Good Faith and Fair Dealing

in numerous ways; and TA committed both material and non-material breaches of the Development Agreement and a non-material breach of the Bond Agreement.[33] [R. 22162-22166, Questions 1, 2, 6 and 7];

(2) The Jury found that the City waived its claims and defenses that TA materially breached the agreements.[34] [R. 22165, Question 3];

(3) As a result of the City's several material breaches of the Development Agreement and the Covenant of Good Faith and Fair Dealing the City caused $22.5 million in damages to TA. [R. 22162-22165, Questions 1, 3-5]; and

(4) Even though the City waived claims and defenses of material breach of the Development Agreement and Bond Agreement,[35] the City did not waive its right to the cost of completion of the curable, non-material breach of the substantially-completed public improvements ($1.75 million).

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[33] The District Court agreed with this interpretation. [R. 24287-24291, 24300-24301].

[34] The District Court agreed with this interpretation as to the Development Agreement but not the Bond Agreement. [R. 24300]. It is undisputed that the Jury found the City waived all material breaches by TA of the Development Agreement. [Verdict Questions 2 and 3; R. 22165, 22167-22168, 24292 (The District Court stating "[c]ounsel for [the City] concedes, and indeed actively argues … that the jury found that [the City] waived its claims and defenses under the Development Agreement")].

[35] The City argues that in answering "yes" to Question 6, the Jury clearly found that TA's breach of the Bond Agreement was "material" or "substantial" despite the absence of express materiality language. [R. 22742, 22975]. If Tooele City is correct and the breach of the Bond Agreement is "material," the City's claim has been waived, as the Jury found that all of the City's claims and defenses of material breach of the Development Agreement and/or Bond Agreement have been waived. The City cannot have it both ways.

Because this interpretation sensibly harmonizes the Verdict and is supported by the Instructions,[36] the Verdict is consistent as a matter of law. Accordingly, this Court should reverse the District Court's erroneous order and remand with instructions to enter a Judgment upon the Verdict based on TA's harmonization.

II. ALTERNATIVELY, BECAUSE THE JURY FOUND FACTS AND APPLIED LAW TO MAKE ULTIMATE LEGAL CONCLUSIONS, THE VERDICT MAY BE INTERPRETED UNDER RULE 49(b) AND JUDGMENT ENTERED FOR TOOELE ASSOCIATES.

Utah Rule of Civil Procedure 49 contemplates two types of jury verdicts: (1) "special verdicts" under Rule 49(a) "in the form of a special written finding upon *each issue of fact*"; and (2) "general verdict accompanied by answer to interrogatories" under Rule 49(b) in the form of "written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict" accompanied by "explanation or instruction as may be necessary to enable the jury *both to make answers to the interrogatories and to render a general verdict*, and the court shall direct the jury both to make written answers and to render a general verdict." UTAH R. CIV. P. 49 (emphasis added).

A "general verdict" is defined by Black's Law Dictionary 9th ed. (2009) as "[a] verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions." Further,

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[36] "A theory of consistency must be supported by the verdict form and the jury instructions." *Carr v. Strode*, 904 P.2d 489, 503 (Haw. 1995); *Guijosa v. Wal-Mart Stores, Inc.*, 797, 6 P.3d 583, 594 (Wash. Ct. App. 2000) *aff'd*, 32 P.3d 250 (2001) ("In harmonizing a verdict, the court does not read the special verdict in isolation, but as part of the whole verdict, including the jury instructions.")

> [a] jury may return multiple general verdicts as to each claim, and each party, in a lawsuit, without undermining the general nature of its verdicts . . . the key is not the number of questions on the verdict form, but whether the jury announces the ultimate legal result of each claim. If the jury announces only its ultimate conclusions, it returns an ordinary general verdict; if it makes factual findings in addition to the ultimate legal conclusions, it returns a general verdict with interrogatories. If it returns only factual findings, leaving the court to determine the ultimate legal result, it returns a special verdict.

Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003) (emphasis added). In contrast to a general verdict with special interrogatories, in the case of a special verdict, "the jury only finds the facts, and the court applies the law thereto and renders the verdict." *Dishinger v. Potter*, 2001 UT App 209, ¶ 17, 47 P.3d 76; *Floyd v. Laws*, 929 F.2d 1390, 1395 (9th Cir. 1991) (theoretical distinction between general and special verdicts is that general verdicts require jury to apply law to the facts, and therefore require legal instruction, whereas special verdicts "compel the jury to focus *exclusively* on its fact-finding role"). "The special verdict was devised to relieve the jury of attempting to apply the law in a complicated case to the facts in arriving at a verdict. . . ." *Brigham v. Moon Lake Elec. Assoc.*, 470 P.2d 393, 397 (Utah 1970) (Ellett, J., concurring).

While there appears to be no published Utah opinions on this issue, other courts have ruled that in determining whether a verdict has been rendered under Rule 49(a) or Rule 49(b), the title of the verdict form is not controlling. Rather, the court must evaluate the function that was performed by the jury, whether the jury exclusively found facts, or whether it also received legal instruction and applied the law to those facts, rendering ultimate conclusions of liability:

> it is clear that, in determining whether a verdict has been rendered under Rule 49(b), as opposed to Rule 49(a), a court need not limit its inquiry to the specific form of the interrogatories framed within the four corners of the verdict sheet . . . we must look, rather, to the totality of the district court's instructions, determining whether the court instructed the jury, either verbally or in writing, to make a general finding for the plaintiff or the defendant, in addition to findings of actual or ultimate facts.

Simmons v. City of Philadelphia, 947 F.2d 1042, 1058 (3rd Cir. 1991).[37]

If this Court determines that the Verdict cannot be harmonized under Rule 49(a), this Court may properly determine that the Verdict should be treated as one rendered under Rule 49(b). While the Verdict in this case is labeled "Special Verdict Form," the Jury did much more than simply find facts. The Jury was asked to resolve mixed questions of fact and law, apply the law in reaching its conclusions, and make overall determinations of liability, including by making ultimate conclusions as to whether material breaches of contract had been proven by a preponderance of the evidence. [*See,*

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[37] *See also Babcock v. General Motors Corp.,* 299 F.3d 60 (1st Cir. 2002) ("Although the Verdict Form is entitled 'Special Verdict Form,' it seems clear that it was not a true 'special verdict' . . . . Here, for example, a special verdict form would have included questions such as whether [plaintiff] was wearing his seatbelt at the time of the accident" rather than "[h]as plaintiff proved her negligence claim by a preponderance of the evidence"); *see also Lavoie v. Pac. Press & Shear Co., a Div. of Canron Corp.*, 975 F.2d 48, 54 (2nd Cir. 1992) ("The charge to the present jury required that it consider the necessary legal principles given to it by the trial court and make determinations of ultimate liability. In such case, the answers to the questions submitted to the jury are not special verdicts, despite the use of those words in the title appended to the form, and Rule 49(a) therefore does not apply."); *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.,* 718 F.2d 553, 574-75 (3rd Cir.1983) (though labeled special verdict, the jury rendered general verdicts with written interrogatories when it made findings of ultimate liability); *State v. Dilboy*, 999 A.2d 1092, 1109 (N.H. 2010), as modified on denial of reconsideration (June 3, 2010) ("Although the parties use the term 'special verdict' to describe the form used by the trial court, "[a] true special verdict is one where the jury does not render a general verdict [in favor of one party or another], but simply finds certain facts and leaves the rest to the court.").

e.g. R. 22162, Question 1]. In the 69 Jury Instructions provided to the Jury, the Jury was instructed on its role as follows:

> It is my role as judge to decide all legal issues, supervise the trial and instruct the jury on the law that *it* must apply. . .
>
> * * *
>
> [K]eep in mind that neither the lawyers nor I actually decide the case, because that is your role. Don't be influenced by what you think our personal opinions are; rather, you decide the case *based upon the law* explained in these instructions and the evidence presented in court.

[R. 22176, Instruction 3 (emphasis added)].

> Your verdict should reflect the facts as found by you *applied to the law* as explained in these instructions and should not be distorted by any outside factors or objectives.

[R. 22198, Instruction 24 (emphasis added)]. The Jury was further instructed as to 42 issues of law it was to apply to the evidence in rendering its Verdict. [R. 22201-22270].

In returning the Verdict, the Jury was required to respond to 33 questions, only four of which were purely factual. The structure of the questions (i.e., the first 20 questions within Questions No. 1 and 2) illustrates that the Verdict was set up as a general verdict with special interrogatories. For example, the Verdict questions first request an ultimate conclusion of liability on the parties' claims of breach (e.g., "Has [TA] proven by a preponderance of the evidence that Tooele City materially breached the Development Agreement, including its implied covenant of good faith and fair dealing?" "Yes"). Following the general questions of ultimate liability, there are between six and twelve questions requiring the Jury to make specific findings of fact and then apply the law to the facts to determine if a material breach of contract was committed (e.g., "By

failing and refusing to extend the term of the Development Agreement pursuant to Section XXIII of the Development Agreement? Yes"). [R. 22162, Question 1, 1(c)].

A true special verdict under Rule 49(a) would have asked the Jury to only make factual findings (such as, "did the City create arbitrary and incomplete punch lists for the public improvements?"), rather than ask the Jury to determine whether such action occurred, and if so, to apply the law to determine whether such action was a breach of contract, whether such breach was material, and whether the breach was waived or performance excused. [Verdict Question 1(d); R. 22201-22204, Instructions 27-30].

By interpreting the Verdict under Rule 49(b), as opposed to Rule 49(a), if the Court finds an "irreconcilable inconsistency" between specific answers (factual findings) and a general verdict (an ultimate conclusion of liability), judgment may still be entered in accordance with the factual findings. UTAH R. CIV. P. 49(b). For example, this Court may instruct the District Court to enter judgment in accordance with the Jury's finding that the City "actively interfered" with TA's completion of public improvements,[38] causing damages to TA, notwithstanding inconsistent general verdicts which arguably preserve the City's claims of breach based on incomplete improvements (Questions 6 and 7). [R. 22163-22166, Questions 1(e)(f)(g)(h), 6, 7].

In sum, the District Court erred when it determined that the Verdict must be interpreted under Utah Rule of Civil Procedure 49(a) based primarily on the form's title,

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[38] "Tooele City cannot actively interfere with [TA's] ability to complete the public improvement as these findings in Section I [of the Verdict] clearly seem to indicate, and then receive the benefit of such a breach, or a defense, under the Bond Agreement that failure to complete public improvements is a breach by [TA]." [R. 24303].

without considering the tasks or function that the Jury actually performed in rendering the Verdict. [R. 24276-24277 (relying on title of form and Jury Instruction 56, in which the Jury was instructed that it was not being asked to render a general verdict, but rather special questions)]. If this Court concludes that the Verdict cannot be harmonized under Rule 49(a), it should instruct the District Court to apply Rule 49(b) and enter judgment in favor of TA in accordance with the Jury's factual findings.

III. THE CITY'S CLAIM THAT IT CAN INVOKE PARAGRAPH 18 OF THE BOND AGREEMENT AS THE "DEATH PENALTY" TO ESCAPE LIABILITY FOR DAMAGES WAS NOT PART OF THE "CASE AS SUBMITTED" TO THE JURY.

During the process of harmonizing a jury verdict a district court should consider the verdict from the jury's perspective – requiring the court to consider the jury verdict form and the "case as submitted" to the jury, including jury instructions and the evidence and arguments presented at trial. *See Perdoni Bros., Inc. v. Concrete Sys., Inc.*, 35 F.3d 1, 6 (1st Cir. 1994) ("Challenges to jury verdicts must be evaluated against the backdrop of the case '*as submitted' to the jury*.") (emphasis added); *Griffin v. Matherne,* 471 F.2d 911, 915 (5th Cir.1973) ("The test employed in determining whether a conflict in the verdict can be reconciled is "whether the answers may fairly be said to represent a logical and probable decision on the relevant issues *as submitted*....") (emphasis added). This issue is one of first impression under Utah law.

In its Memorandum Decision, the District Court wisely noted that the intent of the District Court and litigants in drafting the Verdict questions "is immaterial to the jury" and the Court is obligated to consider only the "*jury responses* in an effort to reconcile

any perceived inconsistencies." [R. 24287 (emphasis added)]. The District Court repeated this principal when it determined,

> [I]t is this Court's effort to make the findings of the [Verdict] consistent with each other, and to do so requires the Court to examine what was before the jury as part of their deliberations, not the litigants. The Pretrial Order was not an exhibit at trial and was not therefore before the jury in the deliberations.

[R. 24290 (concluding the Pretrial Order is not important to the harmonization analysis) (emphasis added)].

Ironically, the District Court then fatally strayed from this principle when it considered the City's argument that the City may, post-trial, invoke Section 18 of the Bond Agreement as the "death penalty," eviscerating all but three or four of the responses in the 33-question Verdict and precluding entry of any damage award in favor of TA:

> The practical effect of the harmonization of [Verdict] Section I, Question 3 and [Verdict] Section II, Question 8 Tooele City argues, is that paragraph 18 of the Bond Agreement, as argued by Tooele City, would preclude the recovery of damages by [TA] by this breach. Thus, the application of the most persuasive of the arguments by the parties to the Court to harmonize the jury's findings in the [Verdict], still renders a fundamental and practical inconsistency to the result. This inconsistency appears to the Court to be irreconcilable.

[R. 24304 (emphasis added)]. The District Court's determination that the Verdict was irreconcilably inconsistent went beyond the case as submitted to the Jury and was based largely upon considering the "practical effect" of the City's argument that Paragraph 18 of the Bond Agreement.[39] The argument (whether as a claim or a defense) – that

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[39] By its own terms, Paragraph 18 may be invoked only "in the event of a Failure to Perform" which is defined as non-performance of an obligation required by the terms of the Bond Agreement or City Ordinance. [Exhibit 220 at 3]. While the City failed to

Paragraph 18 obliterates the Jury's findings related to the City's 16 material breaches which caused $22.5 million in damage to TA – was never presented to the Jury.

In reconciling the Verdict, the starting point should be the contents of the Verdict form itself. Paragraph 18 of the Bond Agreement is not expressly referenced anywhere in the Verdict. At most, Paragraph 18 is incorporated into the Verdict only by implication in the references to the Bond Agreement as a whole (Questions 3, 6, 8-10) – which provides no support whatsoever for any interpretation that would gut the Jury's clear intent of making both parties whole through its damage awards. In short, nothing in the evidence presented at trial, the Jury Instructions or the Verdict itself suggests that the Jury considered the City's argument that Paragraph 18 allows the City to escape liability for its wrongdoing (the "death penalty" argument).

The next step is considering whether the City's "death penalty" argument was presented to the Jury in an Instruction. Paragraph 18 of the Bond Agreement was not expressly referenced in any Instruction. As set forth above, the Jury was instructed on the City's Bond Agreement claims as follows:

> Tooele City claims that [TA] breached the Development Agreement and its amendments, the Annexation Agreement, and the Bond Agreements and their amendments by not performing its obligations as follows:

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request that the Jury make a factual finding as to whether TA committed a "Failure to Perform" as defined by the Bond Agreement, the Jury expressly found that the public improvement standards were not contained in the Bond Agreement or any City Ordinance. Thus, any failure by TA to satisfy standards not contained in the Bond Agreement could not be a "Failure to Perform" under the Bond Agreement. The Jury, again, also found that any failure by TA to complete the public improvements was not a material breach.

1. By failing to complete the public improvements in each phase of the Overlake development, except for Phase1A, in accordance with the terms of the Annexation Agreement, the Development Agreement and its amendments, and the Bond Agreements and their amendments . . .

***

Tooele City claims that it has been damaged as a result *and wants [TA] to pay it money to compensate it for the damages it claims to have suffered.*

[TA] denies Tooele City's claims and its defense claims that (1) Tooele City waived, or should be estopped from asserting, its claims; (2) [TA] substantially performed the Development Agreement and Bond Agreements and committed no material breach of those Agreements . . .

[R. 22201, Instruction 27 (emphasis added)]. The "Bond Agreement" is also referenced in Instructions 33, 46 and 64, although no Instructions pertain to the relief the City is requesting under the Bond Agreement or the City's alleged rights thereunder. Instead, the City asked the Court to instruct the Jury that it only wanted the Jury to "compensate it for the damages it claims to have suffered." [R. 22257-22259, Instruction 57].

The closest the City came to informing the Jury of its "death penalty" theory is Jury Instruction 63, Performance Excused by Material Breach:

Tooele City contends that it was excused from performing its remaining obligations under the Development Agreement because of [TA's] conduct in failing to complete public improvements. In order to establish this as a justification for not performing Tooele City's remaining obligations under the contract, Tooele City must prove that [TA] breached an important part of what [TA] had promised to do. . . .

* * *

. . . If you find that [TA's] conduct was unimportant in relation to what [TA] had promised to perform, **you must find Tooele City was required to continue to perform,** although Tooele City may still be entitled to compensation for the breach.

[R. 22265 (emphasis added)]. Pursuant to this instruction, the so-called "death penalty" could apply only if TA's conduct in failing to complete public improvements was "important" – if it was "unimportant" then there could be no "death penalty" for Overlake. The Jury found that the City's failure to complete the improvements was unimportant (i.e., not "material"). Therefore, the City's argument of "death penalty" cannot apply, and TA should recover the $22.5 million awarded in damages. [R. 22162-22166]. The City's post-trial argument that any minor or technical failure related to completing public improvements invokes the "death penalty" is clearly contrary to the Instructions presented to the Jury.

The only other context in which Paragraph 18 should be considered for the purpose of harmonization of the Verdict is whether the City's Paragraph 18 "death penalty" argument was clearly presented to the Jury based on evidence admitted or arguments made at trial, and if so, whether the evidence sheds light on the Jury's findings. [R. 22184, Instruction 11 ("It will be your duty to determine your verdict *relying solely on the evidence presented during the trial*") (emphasis added)]. The Bond Agreement was entered as Exhibit 220, and Paragraph 18 was referenced as follows:

> Q. And [Paragraph 18] says [in the event of Failure's to Perform] "no further permits or business licenses shall be issued," right? And you understand "shall" be to be mandatory?
>
> A. I do.
>
> Q. Now – and those sort of business permits and licensing in conjunction with this project would be things like building permits, occupancy permits, those sort of things?
>
> A. Those are examples, yes.

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Q. Were, in fact – well, we know that building permits and occupancy permits were, in fact, issued after Phase 1B, right?

A. Yes.

[R. 24339, Transcript Vol. 8, 1943-54].

Q. [Tooele City's counsel] . . . Normally is there a mechanism that a city can exercise to complete public improvements if a developer does not?

***

A. . . . The bond agreement provides that if you don't complete the public improvements in a certain period of time . . . the City then can go in, call on the bond, take the money, go hire its own contractor to come in and do your work for you.

[R. 24338, Transcript Vol. 7, 1642-43].

A. . . . under our city ordinances and under the bond agreement and under the drawings for the bond agreement that were submitted to the City and accepted by the City, the developer was required to complete all major public improvements prior to obtaining approval of subsequent phases, and as I've already testified, that hadn't been done. And that was – that is one way that the City could obtain leverage over a developer, is to say, look, we are not going to approve subsequent phases unless you do what you were supposed to do in prior phases. So that was one reason.

[*Id.* at 1677]. While witnesses for the City testified that Paragraph 18 provided the City with a mechanism to withhold permits and approvals if improvements in prior phases were not completed, there was further evidence that during the time of the construction and permit/approval process, there was no "real time" dispute regarding whether the improvements were complete. When the events actually took place, the City provided letters to TA confirming that the public improvements were in compliance; the City continued to grant TA permits and approvals for subsequent phases; and the City

accepted and maintained the public improvements as if they were completed.[40] The City went so far as to obtain road funds from the State of Utah by claiming that it owned the public streets, something that could happen only if the City had "accepted" ownership of the completed improvements.[41]

Also, the Jury was presented with evidence that even while this litigation was pending the City granted permits and approvals for other developers when their public improvements in prior phases/subdivisions were clearly not fully completed, and the City's policy was that public improvements did not need to be fully completed before additional permits would be issued.[42] Further, the evidence demonstrated that the City failed to take any efforts to enforce the Bond Agreement or act in a manner which demonstrated that the City considered TA to be in breach of the Bond Agreement.[43]

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[40] The City Engineer, City Inspector, Forsgren Engineers and the City Attorney all sent correspondence to TA stating that the City considered the public improvements complete and, consistent therewith, the City reduced the bond amount required for subdivisions 1A, 1B and 1C to 20%. [Exhibits 108, 114, 123, 124, 125, 127, 138, 140]. The City continued to grant permits after phase 1B, despite the public improvements not being fully completed (per agreement). [R. 24339, Transcript Vol. 8, 1943-54]. A City Ordinance provides that public improvements will not be maintained by the City unless they are completed, and the City maintains the public improvements in dispute [R. 24335, Transcript Vol. 4, 804-05] [Exhibit 625].

[41] [R. 24335, Vol. 4 at 792-98; Exhibits 162 and 952 (signed submittal form to UDOT)].

[42] [Exhibit 625]; [R. 24335, Transcript Vol. 4, 800-01 (prior to a policy change in 2005 or 2006 the City did not require full completion of public improvements in a subdivision phase before the issuance of permits)]; [R. 24338, Transcript Vol. 9, 2258-66, 2275 (discussion of other developments – The Cove, Sunset Estates, Cedar Woods – were permitted to proceed despite incomplete improvements)].

[43] The City never called the bonds. Despite its alleged "concerns" the City did not investigate to determine whether the trust deed bond provided adequate security, never

Paragraph 18 and the Bond Agreement also came up in TA's closing argument, but only in the context that the City never invoked Paragraph 18 to deny permits or application "in real time," as follows:

> So let's look at the public improvements and what was going on before they filed this counterclaim. Now, before they filed the counterclaim they were passing the inspections weren't they? Do you remember the certifications that the City engineer, Mr. Webster, had given to 1A, 1B, 1C? Do you remember that the bonds had been reduced to 20 percent, and the bonds can only be reduced after the improvements have been accepted? There was never any complaint before [the filing of the counterclaim] about some problem with the bonds as security. The City, the City's own attorney, said those things have been completed.
>
> There were building and occupancy permits that obviously were issued, and if you remember, the ordinances said you can only issues building and occupancy permits . . . in the event that the public improvements have been completed.
>
> There were additional subdivisions that were improved. If you remember, the Bond Agreement said you can't go any further unless you've completed the improvements in the prior subdivision. Remember I think it's paragraph 16 or 19 of the Bond Agreement itself? 400 West didn't appear on any written punch list before that date. There were no other written complaints about 400 West before that particular date . . .

[R.24342, Transcript Vol. 11, 2842-43].

> Now take a look at the public improvements after March of '04. The inspectors now are telling you that they didn't mean what they say and that you couldn't rely on them. Webster, the city engineer, is saying you can't rely on what I said. They're telling you that the bond reductions were meaningless and *they're telling you for the first time that the bonds are worthless.*

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requested a substitute bond and never requested a subordination agreement. [R. 24339, Transcript Vol. 8, 1960-71].

> *And by the way, they never asked, did they, for a replacement bond? They never asked to solve that particular problem. They never tried to fix any of the bond problems. They could have done that easily.*

[*Id.* at 2845 (emphasis added)].

> . . . I don't want you to think for a second in terms of the public improvements that they say haven't been completed. *One of the issues in this case is is that material. Is that material in light of over $10 million of improvements that have been completed? And the question that you have to ask yourself is: if we had written them a check for $500,000, would that have brought this to an end or would this have continued?* Would this have continued because of concepts like - - that you've seen in the resolutions like, you know, the golf course isn't open to the public because, well, I saw it locked one time, and would it end because of all of the other little nitpicky things that they put in those resolutions? I mean, would that have done it?
>
> That's going to be one of the questions you're going to have to answer, *is that material,* and I think the answer to that question is no, that's not material, because I don't think the City was actually interested in ever solving the problem. I think what they were interested in doing was continuing the dispute on and on and on and jump - - and jump through a hurdle and jump through another hurdle.

[*Id.* at 2856-57 (emphasis added)].

In addition to the evidence at trial that the City never invoked Paragraph 18 in real time, the Jury was also instructed that the key issue was whether TA's breaches were material. The Jury was never informed that the City claimed Paragraph 18 of the Bond Agreement allowed it to kill the entire Overlake project in response to technical and curable breaches caused, at least in part, by the City's "active interference." Thus, the City's argument is irrelevant for the purpose of harmonizing the Jury's Verdict. Further, even if the City's Paragraph 18 was raised or implied, the Jury obviously rejected it by finding that the City acted wrongfully in denying applications for new subdivisions, that

the term of the Development Agreement should be extended, and that the City should receive $1.75 million to complete the public improvements (rather than finding that the non-completion of public improvements was a material breach).

The Jury was not aware of the City's argument that if the Jury found that TA committed a curable, non-material breach of the Bond Agreement, then TA could not recover any portion of the $22.5 million in damages caused by the City, rendering meaningless the weeks that the Jury invested in hearing evidence and deliberating about the City's material breaches. [R. 22201, Jury Instruction 27].

Irrespective of the consequences of the City's failure to inform the Jury of its claim that Paragraph 18 of the Bond Agreement can be invoked as the "death penalty," any pre-trial rulings or post-trial arguments relating thereto are irrelevant for the purposes of harmonizing the Verdict rendered. After all, the Jury could only have drawn its factual findings and legal conclusions exclusively from the case "as submitted," and not from pre-trial rulings or issues about which the Jury was unaware. Attempting to harmonize the Verdict with these potential end results or "practical effects" and issues not submitted to the Jury confounded the District Court's analysis, and lead the District Court astray in concluding the Verdict was irreconcilably inconsistent.

CONCLUSION

The Verdict is consistent. A simple and clear theory of interpretation exists which harmonizes the Verdict responses and is consistent with the Jury Instructions. TA should be awarded $22.5 million in damages and the City should be entitled to $1.75 million to ensure the improvements are completed. Alternatively, the District Court erred in ruling

that the Verdict is to be interpreted under Rule 49(a) without considering the true function of the Jury of rendering findings of fact and applying the law to reach ultimate conclusions of liability, which is more akin to a verdict under Rule 49(b). Further, the District Court erred in ruling that the Verdict could not be harmonized because it could not be reconciled with claims and pre-trial rulings that were not submitted to the Jury.

Accordingly, Tooele Associates respectfully requests that this Court reverse the District Court's declaration of a mistrial, interpret the Verdict harmoniously, and remand to the District Court with instructions to enter judgment based on the harmonized Verdict.

ADDENDUM

Attached hereto in the Addendum are: (A) the District Court's Memorandum Decision and Order; (B) the Jury Instructions; (C) the Verdict; (D) Utah Rule of Civil Procedure 49; (E) Utah Constitution Article I, §10; and (F) the Overlake Map.

DATED this 7th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MILLER GUYMON, P.C., 165 Regent Street, Salt Lake City, Utah 84111, and that pursuant to Rule 26(a), Utah Rules of Appellate Procedure, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were delivered to the following this 7th day of January, 2011, by:

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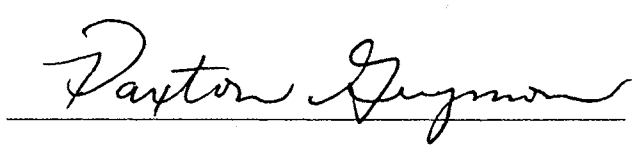

ADDENDUM

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Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

TOOELE ASSOCIATES, L.P., et al.,	:	MEMORANDUM DECISION AND ORDER ON MOTIONS FOR ENTRY OF JUDGMENT
Plaintiffs,	:	
		CASE NO. 060919737
vs.	:	
TOOELE CITY, a municipal corporation, et al.,	:	
	:	
Defendants.	:	
TOOELE CITY, a municipal corporation, et al.,	:	Judge Randall N. Skanchy
Third Party Plaintiffs,	:	
vs.	:	
FORSGREN ASSOCIATES, INC., et al.,	:	
Third Party Defendants.	:	

The Court has before it Tooele Associates, L.P.'s ("Tooele Associates") Rule 58A Motion for Entry of Judgment, filed October 29, 2009, and Tooele Associates' Motion for Ruling on Estoppel Claim, filed September 9, 2009, and Tooele City's Rule 54 and Rule 58A Motion for Entry of Judgment, filed August 7, 2009, and Tooele City's Cross Motion for Ruling on Estoppel Claims. Oral arguments were held January 22, 2010, at which time the Court asked the parties for further briefing on certain specified issues. Tooele Associates filed a Memorandum in Support of Harmonizing All Answers in the Special Verdict Form on

February 1, 2010, and Tooele City filed a Supplemental Memorandum Regarding Special Verdict Form the same day. Arguments on the supplemental Memoranda were heard February 4, 2010. Additional oral argument was thereafter requested by the Court and heard on April 19, 2010 to address specific issues raised by the pending Motions. The Court thereafter received an Objection to a supplemental exhibit used in the argument, and the Court took the Motions under advisement on April 26, 2010. The matters are now ready for the Court's decision. The Court will issue a separate opinion on the two competing Motions for Ruling on Estoppel Claims.

FACTUAL INTRODUCTION

This lawsuit arose over the development of a massive planned community in Tooele City known as Overlake. In October of 1996 Tooele Associates and Tooele City executed an initial Bond Agreement ("Bond Agreement" Trial Exhibit 220) which related to the development of Phase 1A and Phase 1B of the Overlake Project.

Throughout the Decision the Court will refer to the Bond Agreement as Trial Exhibit 220. There are several bond agreements, however, as bonds were posted or amended as various phases of the Overlake Development were proposed. Those agreements or amendments include: Trial Exhibit 267, Amendment to Bond Agreement, dated November 30, 1998; Trial Exhibit 268, Amendment to Bond Agreement for Phases 1C and 1D, dated December 1, 1998; Trial Exhibit 282, Amendment to Bond Agreement for

Phase 1G, dated April 30, 1999; Trial Exhibit 293, Amendment to Bond Agreement for Phase 1E, dated November 15, 1999; and Trial Exhibit 449, Bond Agreement for Phase 1J, dated August 2, 2001.[1] The Bond Agreement sets forth obligations of Tooele Associates to complete specified public improvements for the Overlake development pursuant to Construction Drawings on file with the Tooele City Engineering Department. (Trial Exhibit 220.) In Amendments to the Bond Agreements, Tooele City approved construction of additional phases in Overlake. (Trial Exhibits 267, 268, 282, 293 and 449.)

In December of 1997 Tooele Associates and Tooele City entered into a Development Agreement ("Development Agreement," Trial Exhibit 100), which identified various obligations of the parties associated with the Overlake development. (Jury Instruction 17.) The Development Agreement was amended five times over the course of this project. (Trial Exhibits 101, 102, 103, 104 and 106.) (Jury Instruction No. 17.) The Development Agreement and its amendments will be collectively referred to as the "Development Agreement." Development of Overlake came to a halt in 2001 and thereafter this lawsuit was filed. The respective claims of these parties result from the contractual obligations between the parties in the Development Agreement and Bond Agreement.

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[1]The Bond Agreement and its amendments will collectively be referred to as "Bond Agreement."

At trial Tooele Associates claimed that Tooele City had breached the Development Agreement and its accompanying covenant of good faith and fair dealing by failing to perform various of its obligations thereunder. (Jury Instruction No. 57.) Tooele Associates further claimed that any claims of Tooele City were waived or that Tooele City should be estopped from asserting them, and that as a further defense to Tooele City's claims, Tooele Associates had substantially performed its obligations and committed no material breaches of the Agreements. (Jury Instruction No. 27.)[2]

Tooele City claimed that Tooele Associates had breached both the Development Agreement and the Bond Agreement by not performing its obligations thereunder, primarily that it had not completed public improvements in numerous Phases of Overlake and had failed to pay for water used to irrigate the Overlake Golf Course. (Jury Instruction No. 27.) Additionally, Tooele City denied Tooele Associates' claims and asserted that Tooele Associates' non-performance of its obligations under the Development Agreement precluded any claims against Tooele City.

Following a three week jury trial, on June 19, 2009 the parties submitted their claims and defenses to the jury by way of a Special Verdict Form. The parties had narrowed the questions sought to be

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[2]The issues of estoppel were reserved for the Court and not submitted to the jury. These claims are the subject of a separate Memorandum Decision and Order which will be issued in the next few days.

determined by the jury from those set forth in the Pretrial Order or the Jury Instructions. In Section I of the Special Verdict Form ("SFV"), Tooele Associates set forth its claims against Tooele City. In Section I, Question (1) (references to the SVF questions will be made as I for Section I claims and II for Section II claims) the jury was asked whether Tooele Associates had proven by a preponderance of the evidence that Tooele City "materially breached the Development Agreement, including its implied covenant of good faith and fair dealing." The jury found that of Tooele Associates' twelve claims of material breach of the Development Agreement by Tooele City, Tooele Associates had proven eight of them. The breach claims that Tooele Associates failed to convince the jury included the claims that Tooele City had breached the Development Agreement by:

> I(1)(a) By refusing to recognize and accept as complete public improvements in the Overlake Project Area subdivisions Overlake Estates Phases 1B, 1C, 1D, 1E, 1F or 1G; and
>
> I(1)(d) By creating arbitrary and incomplete punch lists for the public improvements constructed by Tooele Associates in the Overlake Project Area's subdivisions; and
>
> I(1)(j) By finding and asserting that Tooele Associates had materially breached the Development Agreement; and
>
> I(1)(k) By asserting meritless trivial and frivolous claims against Tooele Associates

SVF Section 1, Question 2 asked whether Tooele City had proven by a preponderance of the evidence that Tooele Associates had materially

breached the Development Agreement under six different claims. The jury found that Tooele City had failed to prove by a preponderance of the evidence that Tooele Associates had materially breached the Development Agreement in four of the six claims identified. Among these was the claim in SVF Section I(2)(a) that Tooele Associates had failed to complete specific public improvements identified under the Development Agreement as they related to Transportation Facilities and Circulation System (Development Agreement VII.2, Trial Exhibit 100), and Flood Control Facilities (Development Agreement, VIII.2, Trial Exhibit 100.)

Thereafter, under Tooele Associates' Section I claims, the jury found that:

> Section I
> Question 3: Tooele City waived its claims and defenses, as stated in Question 2, that Tooele Associates materially breached the Development Agreement and/or Bond Agreements.

Thereafter, in Questions 4 & 5, the jury determined what it considered to be reasonable losses suffered by Tooele Associates for Tooele City's breach of the Development Agreement of $5,000,000 for past losses and $17,500,000 for future losses.

The jury was then asked to consider the SVF Section II claims of Tooele City. In response to SVF Section II, Questions 6 and 7 the jury found that Tooele City had proved that Tooele Associates had breached the Bond Agreement by failing to complete public improvements (Question 6), and that Tooele Associates had breached specific sections of the

Development Agreement, including Sections III.6, VII.2, VIII.2 and XVII of the Development Agreement by failing to complete public improvements in Overlake (Question 7). Thereafter, in response to SVF Section II, Question 8 the jury found that Tooele Associates had failed to prove that Tooele City waived its right to claim that Tooele Associates did not complete Overlake public improvements required by the Development Agreement and Bond Agreements. Next, in SVF Section II, Questions 9 and 10, the jury found that Tooele City will incur costs to complete the Overlake public improvements required by the Development Agreement and Bond Agreements in the amount of $1,750,000. Finally, in SVF Section II, Question 11 the jury found that Tooele Associates breached Section 8 of Amendment 4 to the Development Agreement (Trial Exhibit 104) by failing to pay for irrigation water for the Overlake Golf Course, and that Tooele City suffered $70,000 in damages from Tooele Associates' breach as a result thereof. (SVF Section II, Questions 12 and 13.)

As will be the subject of further discussion herein, on first reading of the Special Verdict Form, the jury verdict gives rise to the concern that the jury's conclusions are inconsistent in several areas. First, in SVF Section I, Question 2(a) the jury found that Tooele City had failed to prove that Tooele Associates breached the Development Agreement in Sections VII.2 and VIII.2 and then in SVF Section II, Question 7, the jury concluded that Tooele City successfully proved that Tooele Associates breached the Development Agreement in Sections VII.2

and VIII.2, among others. Further, and more fundamentally, in SVF Section I, Question 3 the jury found that Tooele Associates had proven that Tooele City "waived its claims and its defenses, as stated in Question 2, that Tooele Associates materially breached the Development Agreement and/or Bond Agreements," while the jury concluded in response to SVF Section II, Question 8 that Tooele Associates has failed to prove that Tooele City "waived its rights to claim that Tooele Associates did not complete the public improvements in Overlake required by the Development Agreement and the Bond Agreements." These two findings appear directly inconsistent. Accordingly, before the Court can enter Judgment on behalf of either of the parties, the inconsistencies as set forth in the jury's Special Verdict Form need to be addressed.

PROCEDURAL STATUS OF MOTIONS TO ENTER JUDGMENT

Tooele Associates and Tooele City have moved this Court to enter competing Judgments following the jury verdict pursuant to Rule 54(c)(1), Utah Rules of Civil Procedure.[3]

Tooele City's Motion for Entry of Judgment:

Tooele City struck first by filing its Motion for Entry of Judgment on August 7, 2009, asking the Court to enter Judgment in its favor

[3] Rule 54(c)(1): "Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves."

consistent with the SVF and the Court's pretrial rulings. In summary, Tooele City contends that Judgment should enter in its favor for $1,820,000 and no Judgment should enter in favor of Tooele Associates. It bases this argument on the jury's finding that Tooele Associates breached the Bond Agreement and Development Agreement by failing to complete public improvement projects (SVF Section II, Questions 6 & 7). Therefore, Tooele City argues that paragraph 18 of the Bond Agreement allows Tooele City to withhold any further development permits to Tooele Associates, thus eliminating any and all damages available to Tooele Associates as it would have no expectation for continued development if it breached the Bond Agreement, which the jury found it did. Paragraph 18 of the Bond Agreement (Trial Exhibit 220) provides:

> In the event of a Failure to Perform by APPLICANT, no further permits or business licenses shall be issued, and any existing permits or business licenses that may have been previously issued in the Project may be immediately suspended or revoked by the City Manager until the Improvements are completed and/or the Fees are paid, or until a new bond acceptable to CITY has been executed to insure completion of the remaining improvements and/or payment of Fees.

Adding to this argument, Tooele City argues that the Court must apply to the jury's verdict the Court's previous finding that "[T]he Bond Agreements do, indeed, vest authority in the City to deny further phases based upon incomplete public improvements." See June 11, 2009 Pretrial Order (quoting the Court's August 13, 2008 Memo. Dec. at 20). Tooele Associates' damages were based on the projection of lots and units to be

developed and sold in Overlake from 2003 through 2017. Because the jury found that Tooele Associates breached the Bond Agreement, the City contends that it may invoke paragraph 18 of the Bond Agreement to deny further development, making the issue of recoverable damages to Tooele Associates unavailable.

Tooele Associates' Motion for Entry of Judgment

On October 29, 2009, Tooele Associates filed its competing Motion for Entry of Judgment, seeking a Judgment to be entered in its favor for $22,500,000 against Tooele City on the basis of the jury's findings that Tooele City waived all of its claims and defenses that "Tooele Associates materially breached the Development Agreement and/or Bond Agreements." (SVF Section I, Question 3.) In the alternative, Tooele Associates asks the Court to enter Judgment in its favor for $20,680,000, which is the net amount of its damages (SVF Section I, Question 5), less Tooele City's damages (SVF Section II, Questions 10 & 13).

Tooele Associates argues several points for its position that it is entitled to the damage award assessed by the jury. First, it argues that the City elected damages rather than specific performance as its remedy for Tooele Associates' breach of the Bond Agreement. Tooele City does not disagree that it elected damages. The jury assessed damages for Tooele City in the amount of $1,750,000 to compensate it for unfinished public improvement projects. (SVF Section II, Question 10.) To recover damages for unfinished public improvements *and* to invoke terms of the Bond

Agreement prohibiting Tooele Associates from damages for future development would be, according to Tooele Associates, akin to a double recovery. See Miller v. Robertson, 266 U.S. 243, 257 (1924) (An aggrieved party in a breach of contract suit is entitled to compensatory damages that approximate performance of the contract.).

Next, Tooele Associates contends that the Court's entry of Judgment will extinguish the Bond Agreement, merging the Agreement into the Judgment. See Yergensen v. Ford, 402 P.2d 696, 697 (Utah 1965) (when a final judgment for money is rendered, the original claim is extinguished.); see also Restatement (Second) Judgments § 24 (1982).

Third, Tooele Associates argues that the jury found in Section I, Question 3 of the SVF that Tooele City waived its claims and defenses that Tooele Associates breached the Development Agreement and/or Bond Agreements. Tooele Associates argues that, even if the Bond Agreement was valid after the Judgment is entered, the City waived its right to defend against Tooele Associates' breach of the Agreements thereby precluding any argument to invoke paragraph 18 of the Bond Agreement as a bar to future damages. Tooele Associates further contends that the City's use of paragraph 18 is a defense to prevent the plaintiff's recovery of damages, and the City is barred from bringing defenses pursuant to the SVF Section I, Question 3.

Fourth, Tooele Associates argues that the City's breach of contracts occurred prior to Tooele Associates' breaches. Tooele Associates cites

the proposition that a party to a contract cannot make it difficult for the other to perform, then invoke the non-performance as a defense. See Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979); see also Holbrook v. Master Protection Corp., 883 P.2d 295, 301 (Utah Ct. App. 1994) (a material breach by one party excuses further performance by the non-breaching party.) According to Tooele Associates, if the jury believed that Tooele City could block further development under the Bond Agreements, the jury could not have found that Tooele City materially breached the Development Agreement by refusing to approve future phase development applications. (SVF Section I, Question 1(i).)

Lastly, Tooele Associates argues that the jury's damage assessment is not necessarily for future damages. The City's damage expert, Jason Burningham, included a damage calculation based on the benefit the Development Agreement would have conferred to Tooele Associates, in particular a "market value enhancement," or the increase in the entitlement values within the Development Agreement.

Upon first argument and briefing on the competing Motions for Entry of Judgment, the inconsistent positions taken by the parties for entry of Judgment in their respective favors highlighted the apparent inconsistent nature of the Special Verdict, and thereafter the Court asked the parties to brief the specific issues associated with a perceived inconsistency in the SVF by the Court, which they have done. Both parties provided the Court with written and oral arguments on how

the inconsistencies in the SVF can be explained and both arguments are fundamentally different. The Court has convened at least two specific sessions to hear arguments to provide the Court with a basis upon which to enter a verdict. Both parties have argued persuasively that the SVF is consistent, and each of these persuasive arguments reach fundamentally different end results. Clearly, neither party nor the Court wants a determination that the SVF is inconsistent. It is under this factual and procedural backdrop that the Court turns to its discussion of the issues.

LEGAL DISCUSSION

1) The Matter was Submitted to the Jury by Special Verdict

Tooele Associates makes some argument that the Verdict should be construed as a General Verdict pursuant to Rule 49(b) of the Utah Rules of Civil Procedure. Tooele Associates premises this argument on the suggestion that the verdict form asks the jury to consider and render a verdict on both questions of law and questions of fact. However, nothing in the verdict form or instructions to the jury provides support for such an argument.

The verdict form submitted to the jury was labeled "Special Verdict Form" and was intended by the parties to be used as such. Jury Instruction No. 56 further instructed the jury as to the form of the verdict it was being asked to provide. Jury Instruction No. 56 instructs the jury that:

> This case is not submitted to you for the rendition of a general verdict as is sometimes done, but it will be your function in this case to make findings as to special questions which are submitted to you....
> (Jury Instruction No. 56.)

Accordingly, the Court and the litigants understood that the matter was being submitted to the jury as a Special Verdict, pursuant to Rule 49(a) of the Utah Rules of Civil Procedure.

Special verdict forms are "devised to relieve the jury of attempting to apply the law in a complicated case to the facts in arriving at a verdict." Dishinger v. Potter, 2001 UT App. 209, at ¶ 17, 47 P.3d 76, citing Brigham v. Moon Lake Electric Ass'n., 470 P.2d 393, 397 (Utah 1970).

Additionally, it is the sole province of the Court to apply the law to the facts as found by the jury. As such, arguments by the parties that the jury awarded it damages is limited to a factual determination that the jury "[i]nstead of awarding damages to the plaintiff, the jury merely determined the amount of damages which he had sustained." Brigham, 470 P.2d at 397.

Accordingly, as this Court approaches a review of the Special Verdict, it does so pursuant to Rule 49(a) and Rule 58A of the Utah Rules of Civil Procedure with the assignment to direct the appropriate Judgment, applying the law to the facts as found by the jurors in the Special Verdict.

A special verdict requires the Court to apply the law to the jury's factual findings before entering judgment. See Rule 58A(a), Utah R. Civ. P. ("If there is a special verdict..., the court shall direct the appropriate judgment, which the clerk shall promptly sign and file.") "The special verdict was devised to relieve the jury of attempting to apply the law in a complicated case to the facts in arriving at a verdict." Dishinger, 2001 UT App at 209, ¶ 17.

Thus, under Utah law, Special Verdicts are findings of fact; they are not awards and they differ materially from general verdicts. Dishinger, 47 P.3d 76. A Special Verdict is not a final Judgment. The jury finds the facts and the Court applies those facts to the law to grant or withhold an award. E.A. Strout W. Realty Agency v. W.C. Foy & Sons, 665 P.2d 1320, 1323 (Utah 1983). Damages are a question of fact within the jury's province. Judd ex rel. Montgomery v. Drezga, 2004 UT 91, ¶ 34, 103 P.3d 135. Breach of contract and waiver are mixed questions of law and fact, and as such are also within the jury's province. See United Park City Mines Co. v. Stichting Mayflower Mt. Fonds, 2006 UT 35, ¶ 20, 140 P.3d 1200, and Shar's Cars, L.L.C. v. Elder, 2004 UT App 258, ¶ 14, 97 P.3d 724. In Judd, the jury determined that the plaintiff sustained damages of over one million dollars. However, because there was a statutory cap on the allowable amount of damages, the court was tasked with conforming the jury's findings to the law and reduced the damage amount. Judd, 2004 UT 91. "[A]lthough a party has

the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." Id. at ¶ 33 (quotation omitted). "It is the jury's duty to determine the amount of damages a plaintiff in fact sustained, but it is up to the court to conform the jury's findings to applicable law." Id. at ¶ 34.

2) Attempt to Harmonize the Special Verdict

Whenever possible, the trial court must bring into harmony seemingly inconsistent jury findings. Bennion v. Le Grand Johnson Constr. Co., 701 P.2d 1078, 1082 (Utah 1985) ("Where the possibility of inconsistency in jury interrogatories or special verdicts exists, the courts will not presume inconsistency; rather, they will seek to reconcile the answers if possible.") (citations omitted). However, when provisions within a special verdict are irreconcilably inconsistent, the court may order a new trial or disregard a general finding in favor of a more specific finding. See Wright v. Westside Nursery, 787 P.2d 508, 516-517 (Utah Ct. App. 1990) ("If special findings cannot be reconciled with the general verdict and are sufficiently full and complete in themselves, and are not inconsistent in themselves, judgment must follow the special findings.") (citations omitted); see also Dishinger, 2001 UT App 209 at ¶ 30 ("While the jury's findings support inconsistent legal claims, a court is not precluded, under Rule 49(a), from applying the law to those findings and entering judgment for a party on one theory, as a matter of law, which

precludes judgment on another inconsistent legal theory.) (citations omitted).

Further, the Court's obligation appears to be that it must examine every possible avenue to resolve the questions in a manner to preserve the consistency of the verdict, even if that interpretation is strained. Munafo v. Metro. Transp. Auth., 381 F.3d 99, 105 (2nd Cir. 2004) ("to justify setting aside an otherwise valid jury verdict, the special verdict answers must be 'ineluctably inconsistent.'") (quoting Tolbert v. Queens Coll., 242 F.3d 58, 74 (2nd Cir. 2001)); See also, Julien J. Studley, Inc. v. Gulf Oil Corp., 407 F.2d 521, 526-27 (2nd Cir. 1969), ("But with the Seventh Amendment as an August guide and limitation, we must struggle to avoid a finding of inconsistency and 'attempt to reconcile...by exegesis if necessary,' the specific responses and the jury's overall judgment as to who should win and who should lose.") citing Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 119 (1963). Accordingly, this Court now undertakes the effort to harmonize the apparent inconsistent findings as set forth in the SVF.

The Special Verdict Form sets forth certain findings of fact that appear facially to specifically contradict themselves. The conflict arises in two separate instances in the SVF. The first occurs under Section 1 of the SVF entitled Tooele Associates' Claims. Generally, in Section 1, Question 1, the jury found that Tooele Associates had proven, by a preponderance of the evidence, that Tooele City had materially

breached the Development Agreement and its accompanying covenant of good faith and fair dealing in a number of particulars, i.e., eight of the twelve assertions of claims it made of breach. Of importance, however, is the fact that the jury did not find that Tooele Associates had carried its burden as to certain issues under the Development Agreement as it applied to public improvements. Specifically, the jury found that Tooele Associates failed to carry its burden of proof of breach of the Development Agreement, including the covenant of good faith and fair dealing as to the following:

> SVF, Section I, Question 1(a): By refusing to recognize and accept as complete the public improvements in the Overlake Project Area Subdivisions Overlake Estates Phases 1B, 1C, 1D, 1E, 1F, or 1G; and
>
> SVF, Section I, Question 1(d): By creating arbitrary and incomplete punch lists for the public improvements constructed by Tooele Associates in the Overlake Project Area's subdivisions;

Thus, SVF Section I, Question 1, generally suggests that the jury concluded that, except for issues generally associated with the completion of public improvements requirements of Tooele Associates, Tooele Associates carried its burden of proof to establish Tooele City's breach of the Development Agreement and the accompanying implied covenant of good faith and fair dealing. The jury also found that Tooele Associates failed to meet its burden of proof under this question as to SVF Section I, Question 1(j) (by asserting that Tooele Associates had materially breached the Development Agreement) and SVF Section I,

Question 1(k) (by asserting meritless, trivial and frivolous claims against Tooele Associates). Those findings, however, are not important to this discussion as they can be reconciled with the jury's responses to SVF Section I, Questions 1(a) and 1(d). In short, Tooele Associates had not completed public improvements, as it now readily admits, and thus asserting claims against Tooele Associates that it had breached the Development Agreement by failing to complete public improvements is consistent with the jury's conclusion here and in response to SVF, Section II questions as discussed later.

SVF Section I, Question No. 2 under Tooele Associates' Claims asked the jury to determine if Tooele City had proven by a preponderance of the evidence that Tooele Associates "materially breached the Development Agreement" as to specific sections of the Development Agreement. The jury found that Tooele City had proven some, but not all, specific breaches of the Development Agreement by Tooele Associates.

In summary then, in SVF Section I, Questions 1 and 2 the findings of the jury establish that Tooele City materially breached the Development Agreement in various particulars, except for its insistence on the completion of public improvements.

Significantly, SVF Section I, Questions 1 and 2 are directed exclusively to Tooele Associates' claims under the Development Agreement.

In SVF Section I, Question 3, the jury was then asked and answered the following question:

> Has Tooele Associates proven that Tooele City waived its claims and its defenses, as stated in Question 2, that Tooele Associates materially breached the Development Agreement and/or Bond Agreements?
>
> Yes_X__ No_____

This is the first time the jury was asked to consider a question associated with the Bond Agreement, although SVF Section I, Question 3 specifically directed the jury to SVF Section I, Question 2, which dealt exclusively with the Development Agreement. Thereafter, the jury completed the remaining questions under SVF Section I by determining that Tooele Associates had sustained losses as a result of the breaches and determined those losses to be $22,500,000.[4] This concluded all of the questions directed to the jury under the Tooele Associates' Claims, SVF Section I.

The jury was then asked to determine Tooele City's Claims in Section II of the SVF. The jury found that Tooele City had proven that Tooele Associates breached the Bond Agreements and Bond Agreement amendments (SVF Section II, Question 6), and Sections III.G, VII.2, VIII.2 and XVII of the Development Agreement by failing to complete public improvements in Overlake. (SVF Section II, Question 7.) It should be noted here that the first facially inconsistent finding of the jury occurs here, in response to SVF Section II, Question 7. Here the jury found that Tooele

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[4]SVF Section 1, Question 5, breaks out the historic and future losses as $5 million and $17.5 million, respectively.

City had proven that Tooele Associates breached Sections VII.2 and VIII.2 of the Development Agreement, whereas the jury concluded in response to SVF Section I, Question 2(a) that Tooele City had failed to meet its burden to prove that Tooele Associates breached the Development Agreement regarding those same two sections. This apparent inconsistency will be addressed hereafter.

Thereafter, in SVF Section II, Question 8, the jury was asked and answered the following:

> Has Tooele Associates proven that Tooele City waived its rights to claim that Tooele Associates did not complete public improvements in Overlake required by the Development Agreement and the Bond Agreements?
>
> Yes _____ No __X__

Thus, consistent with the jury's findings in SVF Section 1, the jury generally found that the public improvements under the Development Agreement were not completed by Tooele Associates, which caused the jury to conclude that Tooele Associates had breached both the Bond Agreements and the Development Agreement. The jury went on to determine the amount of loss to the City for those breaches at $1,750,000. (SVF Section II, Question 10).[5]

[5]The jury further found that Tooele Associates had breached another term of Amendment 4 to the Development Agreement by failing to pay for irrigation water and found a damage amount to the City of $70,000. (SVF Section II, Questions 11, 12, 13.)

The jury's response to SVF Section II, Question 8 also is facially inconsistent as it appears to directly contradict SVF Section I, Question 3. In short, SVF Questions 3 and 8 suggest that Tooele Associates both proved, and failed to prove, that Tooele City waived its claims and defenses under the Development Agreement and the Bond Agreement. This is an oversimplified statement of the conflict between these two findings, but it underscores the direct and substantial conflict between these two findings on an initial observation. Before these conflicts are addressed in detail, a few general conclusions will be set out.

A. No One Party Drafted the SVF

In attempting to reconcile the apparent inconsistencies, Tooele Associates argues that the drafter of the SVF was Tooele City and therefore any ambiguity should be construed against the drafter of the document. (Tooele Associates' Memorandum in Support of Harmonizing All Answers in the Special Verdict Form, p. 3, fn. 3.) It is a well established rule in Utah that any uncertainty with respect to the construction of a contract should be resolved against the party who had drawn the agreement. Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982). Tooele Associates does not point the Court toward case law that would suggest such a rule of construction would be applicable in attempting to address an inconsistency in a Special Verdict Form, nor would that be helpful here if such case law existed. Nor is it that simple in this case, as each of the parties participated in the

conglomeration that is now the SVF. Prior to submission of the case to the jury, each party brought to the Court, on the eve of closing arguments, competing Special Verdict Forms. The parties thereafter, in concert with the Court, worked through the intended form for the SVF, cobbling together from the respective parties' competing Special Verdict Forms, the final Special Verdict Form before the Court today. Accordingly and unfortunately, each party and the Court bears responsibility for the result. As such, no principle of contract construction assists the Court to reach a result or dictate at whose feet a result should fall. Nor is such an approach in keeping with the obligation of the Court to harmonize the findings of the jury by resolving the issue, not by determining who drafted the inconsistency and then holding for an interpretation against that party, as is done in contract construction This Court's job is to reconcile any inconsistency, if it is not otherwise irreconcilable. Wright v. Westside Nursery, 787 P.2d 508, 516 (UT App 1990).

B. The Intent of the Drafters is Immaterial to a Resolution of the Inconsistency.

Tooele Associates further suggests that the intent of the drafter in preparing the question to the jury should control. After repeated argument over the language to be included in each of the questions, the Court is not able to determine what exactly each litigant wholly intended to convey by the question to the jury. Nor was the jury privy to the

parties' intent, as their task was to take the Special Verdict Form and make their findings as directed by the individual questions set forth in each interrogatory. Further, it is immaterial to the jury what the intent of the drafter may have been, as the Court's obligation is to view the jury responses in an effort to reconcile any perceived inconsistencies.

C. Questions 2(a) and 7 of the SVF.

The apparent conflict between SVF Questions 2(a) and 7 is that both questions, similar on their face, appear to be answered inconsistently.

SVF Section I, Question 2, under Tooele Associates' Claims, asked the jury to determine whether Tooele City had "proven by a preponderance of the evidence that Tooele Associates materially breached the Development Agreement." To this question the jury returned a finding of "yes," i.e., Tooele City had proved that Tooele Associates had materially breached the Development Agreement. The jury was then asked to identify how Tooele Associates had breached the Development Agreement by answering "yes" or "no" to specific identified provisions of the Development Agreement. In SVF Section I, Question 2(a) the jury found that Tooele City had failed to prove a material breach by Tooele Associates "to complete public improvements in Overlake pursuant to Sections VII.2 and VIII.2 of the Development Agreement. Section VII.2 of the Development Agreement relates to Tooele Associates' obligations to provide Transportation Facilities and Circulation Systems, which in summary

required Tooele Associates to build streets in conformity with the adopted Overlake Street Plan as set forth in the Development Plan, an exhibit to the Development Agreement. (Development Agreement, Trial Ex. 100.) Section VIII.2 of the Development Agreement required Tooele Associates to construct and provide sufficient flood control facilities necessary to serve the Overlake Project Area. (Development Agreement, Trial Ex. 100.)

SVF Section II, Question 7 under Tooele City's Claim asks a similar question, as follows: "7. Has Tooele City proven that Tooele Associates breached Sections...VII.2, VIII.2...of the Development Agreement by failing to complete public improvements in Overlake?" To this question, the jury answered "yes," thus creating a direct inconsistency with its response to SVF Section I, Question 2(a).

A close examination of these two questions may, however, provide a distinction between the two sufficient for the Court to conclude that they are not internally inconsistent. First, SVF Section I, Question 2(a) asks the jury to determine that the City had proven a "material" breach of this section of the Development Agreement, while SVF Section II, Question 7 omits the materiality finding for the breach. As will be seen in the Court's discussion of the apparent inconsistencies between SVF Questions 3 and 8, the inclusion of a finding of a "material" breach is a requirement the jury was asked to find in each of the Tooele Associates' claims. Thus, the jury could have concluded that Tooele

Associates breached Sections VII.2 and VIII.2 of the Development Agreement, but that breach was not material. A review of the jury instructions gives some weight to such a conclusion. Tooele City's claims against Tooele Associates are outlined in Jury Instruction No. 27. Nowhere in that instruction is the jury presented with the idea that Tooele City's obligations require proof of a "material" breach of any of the Agreements. Tooele Associates' claims are outlined for the jury in Jury Instruction No. 57 and they are similar in tone to those of Tooele City's, that is, there is no recitation of a requirement for a finding of a "material" breach. Jury Instruction No. 30 defines a "material" breach for the jury. It instructs the jury that it must decide "whether there was a material breach of the Development Agreement. A breach is material if a party fails to perform an obligation that was important to fulfilling the purpose of the contract. A breach is not material if the party's failure was minor and could be fixed without difficulty."

The jury, after reading these instructions would have been directed by the SVF to determine whether under Tooele Associates' claims Tooele City had proven a "material" breach of the identified sections of the Development Agreement in SVF Section I, Question 2(a). The jury determined that Tooele City had not been successful in that effort. At SVF Section II, Question 7 the jury, with similar specificity, was asked a virtually identical question, but for the materiality requirement, and the jury concluded that Tooele City had proven that breach by Tooele

Associates. Accordingly, the Court can view this inconsistency as a distinction the jury drew from the manner in which the two questions were qualified by the descriptor.

Admittedly, this is a strained construction as the parties made little distinction about the difference on those claims in the Pretrial Order.[6] However, what the parties may set forth in the Pretrial Order is less important to this discussion, as it is this Court's effort to make the findings of the SVF consistent with each other, and to do so requires the Court to examine what was before the jury as part of their deliberations, not the litigants. The Pretrial Order was not an exhibit at trial and was not therefore before the jury in its deliberations.

The only other real distinction between SVF Questions 2(a) and 7 is the omission in SVF Section II, Question 7 of the preponderance of evidence standard which was recited in SVF Section I, Question 2(a). This is a distinction without a difference, as the jury was instructed in Jury Instruction Nos. 15 and 18 that the party making a claim has the burden to prove it by a preponderance of the evidence.

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[6]The Pretrial Order makes no such fine distinction. The recitation of both Tooele Associates' claims (Pretrial Order III.A) and Tooele City's claims (Pretrial Order III.B) speak in terms of material breaches under the Development Agreement. Tooele City's discussion in the Pretrial Order related to the Bond Agreement and the requirement for completion of public improvements is similarly addressed as material breaches of the Bond Agreement. (Pretrial Order III.B.)

Accordingly, the Court construes any apparent inconsistency between SVF Questions 2(a) and 7 as explained by the jury's deliberation over the material or non-material nature of the breach. Thus, the jury found that Tooele City failed to prove that Tooele Associates "materially" breached the Development Agreement, but that it proved Tooele Associates breached the Development Agreement.

D. A General Discussion of SVF Section I, Question 3 and SVF Section II, Question 8.

A review of SVF Section I, Question 3 provides the following general conclusions.[7]

(i.) SVF Section I Questions Refer to the Development Agreement. The introduction to SVF Section I, Question 3 asks the jury to determine if Tooele City waived its claims and its defenses, **"as stated in Question 2."** The reference to SVF Section I, Question 2 referred the jury to specific sections of the Development Agreement to determine whether Tooele City proved a material breach of those specific identified sections. SVF Section I, Question 2 does not ask any question related to the Bond Agreement. This limitation clearly suggests that SVF Section I, Question 3's waiver of claims and defenses is limited to the

[7]The "real" general conclusion that can be drawn from a review of Section I, Question 3 is that compound questions are anathema to the drafting of a Special Verdict Form. The Court now fully understands why the objection to a compound question is so appropriate at trial and elsewhere.

Development Agreement. Counsel for Tooele City concedes, and indeed actively argues, that such is the case, i.e., that the jury found that Tooele City waived its claims and defenses under the Development Agreement.

(ii) **Language is limited by its express modifiers**. SVF Section I, Question 3 specifically asked the jury to consider whether Tooele City has "waived its claims and defenses, as stated in Question 2,...." As previously discussed, the heading of SVF Section I, Question 2 limited the jury to consider whether Tooele City had met its burden to show that Tooele Associates had materially breached the Development Agreement. Each of the six subparts to SVF Section I, Question 2 directed the jury to specific sections of the Development Agreement to identify whether those specific sections of the Development Agreement were subject to a finding of a material breach. Thus, SVF Section I, Question 3 limited the scope of the jury's review to the Development Agreement, as specifically outlined in SVF Section I, Question 2.

In its argument to support a consistent SVF, the City acknowledges that to read SVF Section I, Question 3 in any other manner creates an irreconcilable inconsistency in the SVF. Counsel for Tooele Associates argues, however, that the waiver discussion of SVF Section I, Question 3 obviates all of Tooele City's defenses, but preserves in SVF Section II, Question 8 all of Tooele City's claims under the Bond Agreement. The

Court will address this argument, which it does not find persuasive, later in this argument.

(iii) **SVF Section I Questions Refer to "Material" Breaches.** SVF Section I, Question 3 and SVF Section II, Question 8 differ as well in the nature of the breach the jury is asked to determine. SVF Section I, Question 3 asks the jury to determine whether Tooele Associates proved that Tooele City "waived its claims and its defenses, as stated in Question 2, that Tooele Associates **materially** breached the Development Agreement and/or Bond Agreements?" The use of the term "material" is important and is used in each of the Section I questions concerning the claims of Tooele Associates. In both SVF Questions 1 and 2, the jury was asked to determine whether the breaches were material. The jury was further instructed in Jury Instruction 63 that the materiality of the breaches could excuse Tooele City's performance of, and effectively terminate, the Development Agreement. The only other jury instruction relating to the materiality of breaches, Jury Instruction No. 33, was likewise directed only to the Development Agreement.

SVF Section II, Question 8 has no "material" breach requirement in the question posed to the jury.

(iv) **SVF Section I, Question 3 asks the Jury Three Questions.** SVF Section I, Question 3 is framed in the conjunctive and the disjunctive, as the question placed to the jury was whether Tooele Associates had proven that "Tooele City waived its claims and its

defenses, as stated in Question 2, that Tooele Associates materially **breached the Development Agreement and/or Bond Agreements?"**

Thus, the compound question posed to the jury was either one of three options: (1) Tooele City's waiver of its claims and defenses that Tooele Associates materially breached the Development Agreement; (2) Tooele City's waiver of its claims and defenses that Tooele Associates materially breached the Bond Agreement; or (3) Tooele City's waiver of its claims and defenses that Tooele Associates materially breached both the Development and the Bond Agreements. See, Webster's Third New International Dictionary of the English Language Unabridged 80 (1986); see also, State Ins. Fund v. Industrial Comm'n of Utah , 205 P.2d 245, 246-47 (Utah 1949)(holding that an order requiring "Merchants Police and/or Intermountain Service Bureau, Inc." to pay an injured employee's expenses did not indicate which entity must pay.) Such an array of options makes it unclear exactly what the answer "yes" may mean, as the jury was asked three separate questions.

Thus, the question is whether the jury found that Tooele City waived its claims and defenses (a) under both the Development Agreement and the Bond Agreements; or (b) under the Development Agreement or under the Bond Agreement. This compound question requires the Court to select the appropriate question to attempt to make the findings of the SVF consistent.

SVF Section II, Question 8, by comparison, is framed in the conjunctive and asks the jury whether "Tooele Associates waived its rights to claim that Tooele Associates did not complete public improvements in Overlake required by the Development Agreement and the Bond Agreement?" This asks the jury to consider both the Development Agreement and the Bond Agreement together. The jury answered "No" to this question.

(v) **SVF Section I, Question 3 Refers to Both Tooele City's Claims and Defenses.** SVF Section I, Question 3 further asks the jury to determine if "...Tooele City waived its claims and its defenses...." This part of the question is conjunctive in that it requires the jury to decide this question without separating the two. See generally, Parr v. Stubbs, 117 P.3d 1079 (UT App 2005).

Tooele Associates in written arguments addressing the apparent inconsistency of SVF Section I, Question 3 and SVF Section II, Question 8 suggested that SVF Section I, Question 3 really asks only two questions:

(1) Has Tooele Associates proven that Tooele City waived its claims and its defenses, as stated in Question 2, that Tooele Associates materially beached the Development Agreement? And

(2) Has Tooele Associates proven that Tooele City waived its defenses that Tooele Associates breached the Bond Agreements?

Thus, Tooele Associates argues, by bifurcating these questions into two, the jury could conclude that Tooele City had waived its claims and defenses under the Development Agreement and had waived its defenses under the Bond Agreement. Such an argument, however, is not persuasive, as it asks the Court to ignore some of the specific terms in each of these theoretical questions. As to SVF Section I, Question 2, the jury would have to ignore the language "and/or Bond Agreements" and in essence read out the jury finding that Tooele City had waived claims and defenses under the Bond Agreement. Further, in proposed SVF Section I, Question 2, the Court would have to ignore the words "it claims," "as stated in Question 2," "materially," and "Development Agreement and/or...." Both parties have argued to the Court the general rule that a Court cannot simply ignore findings of fact determined by the jury. See, Atwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890-91 (2nd Cir. 1988) ("...proper defense to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding.") In order to accept Tooele Associates' attempt to provide a consistent result from the findings on this argument would be to ignore the jury's findings. This the Court cannot do.

As part of this discussion Tooele Associates further asserts that SVF Section II, Question 8 does not preserve the defense Tooele City asserts under the Bond Agreement as the question is limited solely to Tooele City's "right to claim." Tooele Associates argues that the right

to claim is a noun, i.e., claims, and as such does not preserve a defense. Thus, Tooele Associates would conclude that SVF Section II, Question 8 preserves only Tooele City's affirmative claims for relief under the Bond Agreements, and therefore renders SVF Section I, Question 3 and Section II, Question 8 consistent, as SVF Section I, Question 3 waives all Tooele City's claims under the Development Agreement and all defenses under the Bond Agreement, preserving only Tooele City's "claims" under the Bond Agreement. Thus, Tooele Associates argues "the jury could determine that Tooele City's defenses under the Bond Agreement were waived, but, as expressed in SVF Section II, Question 8, not the right to make the very specific claim that Tooele Associates did not complete public improvements." (Tooele Associates' Memorandum in Support of Harmonizing All Answers in the Special Verdict Form, p. 5.) Tooele Associates concludes that such an interpretation would comport with the jury's findings of damages to both parties, because it preserves Tooele City's claims, but waives its defenses, under the Bond Agreement.

Such an argument would require the Court again to ignore the plain language of these two questions posed to the jury. Furthermore, Tooele City argues that "right to claim" is a verb as used in SVF Section II, Question 8, not a noun, and that it preserves both the "sword and shield" effect of the nature of a claim. The definition of a "claim" is defined in Black's Law Dictionary is "to demand as one's own or as one's right; to assert; to urge; to insist...." This definition lends support to the

conclusion that Tooele City's "right to claim" as used in SVF Section II, Question 8 is both a defense and a claim. Accordingly, the better argument for a finding of consistency between these two questions is that SVF Section II, Question 8 includes both claims and defenses of Tooele City.

(vi) SVF Section II, Question 8 is More Specific Than SVF Section I, Question 3. SVF Section II, Question 8 is more specific than SVF Section I, Question 3, and on this issue both litigants seem to agree. SVF Section II, Question 8 asks the jury solely to determine whether "Tooele Associates has proved that Tooele City waived its rights to claim that Tooele Associates did not complete public improvements in Overlake required by the Development Agreement and the Bond Agreements?" This question deals solely with the limited issue of Tooele City's public improvement claims under both the Development Agreement and the Bond Agreements.

SVF Section I, Question 3 asks a much broader question which includes whether Tooele City waived both claims and defenses to at least six claims under the Development Agreement and unspecified claims and defenses under the Bond Agreement. As part of the Court's questions placed to the litigants, each was asked whether SVF Section I, Question 3 or SVF Section II, Question 8 was more specific. Tooele City responded that SVF Section II, Question 8 was more specific. Tooele Associates originally noted in its briefing that SVF Section II, Question 8 was "a

very specific question," but altered its argument in the last court hearing. It is the Court's conclusion that SVF Section II, Question 8 is more specific than SVF Section I, Question 3.

The Court makes this observation only as it relates to the harmonizing of potentially conflicting provisions of the SVF. While not directly on point, principles of contract construction and statutory interpretation generally suggest that general terms of a contract are given less weight than more specific terms. See, Wood v. Utah Farm Bureau Ins. Co., 19 P.3d 392, 395-96 (Utah App. 2001); see also, Williams v. Public Service Comm'n of Utah, 754 P.2d 41, 48 (Utah 1988)("In resolving the conflict between the two statutes, we are guided by the principle that when two statutory provisions conflict, the more specific provision will prevail over the more general provision.") Further, and more on point is this same general principle as expressed by the Utah Court of Appeals' discussion of reconciliation of verdict inconsistencies. In Wright v. Westside Nursery, 787 P.2d at 516, the Court notes that "...where the two cannot be reconciled, as in this case, the more specific finding must govern the outcome." See also, (Knape v. Livingston Oil Co., 193 Kan. 278, 392 P.2d 842, 844 (1964)(If special findings cannot be reconciled with the general verdict and are sufficiently full and complete in themselves, and are not inconsistent in themselves, judgment must follow the special findings.")

The Court draws the following conclusions from these general observations.

The only reading of the SVF that comes close to harmonizing the apparent inconsistencies discussed above is one which results in the conclusion that the jury's findings in response to SVF Section I, Question 3 waive Tooele City's claims and defenses under the Development Agreement, but do not waive Tooele City's claims and defenses under the Bond Agreement. As both parties point out, the jury found that Tooele City had materially breached the Development Agreement. SVF Section I, Questions (a)-(l) set forth with specificity the breach claims under the Development Agreement which Tooele Associates proved by a preponderance of the evidence. The jury's findings expressly exempt from such a conclusion that Tooele City materially breached the Development Agreement as it related to public improvements required to be performed by Tooele Associates. Those exemptions are evidenced by the jury findings that Tooele Associates had failed to prove a material breach to SVF Section I, Questions (a), (d), (j) and (k). These findings include Tooele Associates' claim of breach of the implied covenant of good faith and fair dealing.

The jury's response to SVF Section I, Question 2 does not disrupt this harmonization, as this question narrowed the jury's findings on public improvements to two specific sections of the Development Agreement as referenced in SVF Section I, Question 2(a). Thus, the conclusion

holds that the jury found that Tooele Associates had failed to prove a material breach of the Development Agreement by Tooele City, and further that Tooele City had failed to prove that Tooele Associates had materially breached the Development Agreement's specific Sections VII.2 and VIII.3. Thereafter, the jury found in SVF Section I, Question 3 that Tooele City had waived its claims and its defenses under the Development Agreement, thus prohibiting Tooele City from a recovery or a defense under the terms of the Development Agreement.

Thereafter, the jury moved to Tooele City's claims and found that non-material breaches of the Bond Agreement by Tooele Associates' failure to complete public improvements, SVF Section II, Question 6. The jury further found that Tooele City had proven non-material breaches of the Development Agreement, by failing to complete public improvements, SVF Section II, Question 7(d), but these non-material breaches are waived by the operation of the jury's finding to SVF Section I, Question 3.

Finally, as it relates to this discussion of inconsistent provisions of the SVF, the jury found in SVF Section II, Question 8 that Tooele City had proven that non-material breaches of both the Development Agreement and the Bond Agreement had been incurred by Tooele Associates. However, the operation of the jury's response to SVF Section I, Question 3 lost all right of Tooele City to proceed on such claims under the Development Agreement. The jury thereafter worked through Tooele City's claims associated with the breach of this Agreement and concluded in response

to SVF Section II, Question 10 that damages of $1,750,000 was reflective of the injury sustained by Tooele City by Tooele Associates' non-completion of the public improvements.

3. Irreconcilable Inconsistencies in the SVF

Notwithstanding this Court's attempt to reconcile the apparent inconsistencies in the SVF, this analysis comes short of accomplishing that purpose for the following reasons:

A. Jury Conclusions Concerning Awards. Several inconsistencies still remain as the Court examines the SVF's findings of damages to the theory that the jury viewed the obligations of the parties from both the position of duties, claims and defenses under the respective Development Agreement and the Bond Agreement.

(i) Section I of the SVF includes the Covenant of Good Faith and Fair Dealing. The jury was asked in SVF Section I to determine whether Tooele Associates had proven Tooele City intentionally breached the Development Agreement, "including its implied covenant of good faith and fair dealing." The jury found as part of SVF Section I material breaches the following:

- The City actively interfered with Tooele Associates' ability to complete the public improvements (SVF, Section I, Question 1(e), (f) & (g);

- The City's failure to approve additional subdivisions is a material breach of the Development Agreement (SVF, Section I, Question 1(i));
- The City's refusal to extend the term of the Development Agreement was a material breach (SVF, Section 1, Question 1(c)).

Each of these findings have some connection, either directly as in SVF Section I, Question 1(e), (f), (g) and (i), or indirectly with public improvements. The City's argument that a consistent reading of SVF Section I, Question 3 and SVF Section II, Question 8 leaves Tooele City's claims for breach under the Bond Agreement still viable, vitiates any jury finding on these specific issues related to the public improvements. The jury was instructed in Jury Instruction No. 33 that "Tooele City cannot by a willful act or omission make it difficult or impossible for Tooele Associates to perform under the terms of the Development Agreement or the Bond Agreement...." Tooele City cannot actively interfere with Tooele Associates' ability to complete the public improvements as these findings in Section I clearly seem to indicate, and then receive the benefit of a such breach, or a defense, under the Bond Agreement that failure to complete public improvements is a breach by Tooele Associates. Such a result is inequitable and contrary to the obligations of parties under covenants of good faith and fair dealing.

The practical effect of the harmonization of SVF Section I, Question 3 and SVF Section II, Question 8 Tooele City argues, is that paragraph 18 of the Bond Agreement, as argued by Tooele City, would preclude the recovery of damages by Tooele Associates by this breach. Thus, the application of the most persuasive of the arguments by the parties to the Court to harmonize the jury's findings in the SVF, still renders a fundamental and practical inconsistency to the result. This inconsistency appears to the Court to be irreconcilable.

Some argument is made by Tooele City that the jury "found that the City did not interfere with TA's ability to follow TA's own public improvement construction plans." (Tooele City's Supplemental Memorandum Regarding Special Verdict Form, p. 14.) Tooele City asserts that Jury Instruction No. 33 instructed the jury that Tooele Associates would be excused from its performance under the Development Agreement and the Bond Agreement "[i]f you decide that Tooele Associates was willing and able to perform its obligation, but that it could not perform that obligation because of something that the other party purposefully did or failed to do." Tooele City concludes that the jury's finding that Tooele Associates breached the Development and Bond Agreements indicates that Tooele Associates was either not willing and able to complete the public improvements or that Tooele City did not purposefully prevent Tooele Associates from completing those improvements.

This argument is undercut, however, by the jury's specific findings in SVF Section I, Questions (e), (f), (g) and (i) that Tooele City materially breached the Development Agreement by such activity, although no direct question was asked of the jury. Clearly, this argument highlights the irreconcilable inconsistency in the SVF. The Court cannot discern from this review of these questions in SVF Section I any explanation that would render consistent those provisions with the jury's conclusion that Tooele Associates breached the Development Agreement (SVF Section II, Question 7) and the Bond Agreement (SVF Section I, Question 6).

(ii) Completion of Public Improvements is an Obligation of both the Development and Bond Agreements. As it relates to public improvements, the Development Agreement and the Bond Agreements are similar in nature. Each requires Tooele Associates to complete public improvements in accordance with approved construction drawings and specifications, as well as the City's subdivision and building regulations. The Development Agreement sets forth Tooele Associates' obligations on public improvements, which include the obligations for street and infrastructure for transportation. (Trial Ex. 100; Section VII.2.) These obligations are specific in their nature and require performance consistent with "the preliminary and final subdivision plats and all site plan approvals." (See, Trial Ex. 100, Section VII.2.E.) The Bond Agreement similarly requires completion of public improvements,

with the express purpose to "guarantee the proper completion of the improvements...." (Trial Ex. 220, p. 3.)

While the Court and the parties have agreed in the Pretrial Order that a breach of one of these two Agreements may not be a breach of the other, the public improvement obligations are common to both. Thus, while the Court has strived to find a consistent explanation for the jury's inconsistent verdict based on distinguishing the two, the issue of public improvements is common to both.

The best example of this is the inconsistent nature of the jury's findings to SVF Section I, Question 2 and SVF Section II, Questions 6 and 7. While the Court has tried to distinguish the two by a materiality requirement, the fact remains they each arrive at an inconsistent conclusion of breach on public improvements. Thus, since the obligations are similar in nature, to reach the conclusion that the jury made a distinction between the two when it comes to the obligation of performance or breach is a difficult and tenuous distinction. While it may very well be a distinction with a difference, public improvements, and their completion are common to both the Development Agreement and the Bond Agreement. Such a commonality makes it difficult for the Court to have any confidence that the jury was able to distinguish between the two in the contested fashion that would render the jury's findings consistent.

(iii) **The Distinction Between the Development Agreement and the Bond Agreement are Fundamental and Important to the Result.** The Development Agreement delineates the obligations of each of the parties as it relates to the development of Overlake. As recognized in the Development Agreement, Tooele City "may enter into a Development Agreement in appropriate circumstances in order to promote the orderly and appropriate development of property, and to provide public facilities, amenities, and other benefits in connection with the proposed development." (Trial Ex. 100, p. 3.) As party to this Development Agreement, Tooele Associates was required to present a Development Plan for Overlake, which Tooele Associates did. A general reading of the Development Agreement indicates that it contains no contractual rights or obligations in the event of default by either of the parties; in short, the Development Agreement is a recitation of what each party undertakes to see through in the development of Overlake. (Pretrial Order, IV, para. 48.)

The Bond Agreement is substantially different from the Development Agreement as it sets forth not only the obligations of Tooele Associates as it relates to public improvements, but remedies for default. Tooele Associates' obligations under the Bond Agreement require completion of public improvements and set forth definitions associated with "failure to perform." Tooele City argues that non-completion of these required public improvements is a material breach of the Bond Agreements, and it allows Tooele City to withhold approval of new phases of development of

Overlake, and to recover damages. Thus, Tooele City argues that since Tooele Associates' damages are based upon its ability to develop and sell additional lots in units in Overlake, and since the finding of breach of the Bond Agreement by the jury would preclude such development, no damages are properly awarded to Tooele Associates. In short, Tooele City argues that Tooele Associates would be entitled to no Judgment for breach of the Development Agreement by Tooele City, and Tooele City would be entitled to a recovery of $1.7 million for Tooele Associates' breach of the Bond Agreement.

Without addressing the effect of the jury's findings on this entirely legal issue, the fact that such a result hangs upon such a strained reading of whether claims under the Development Agreement, Bond Agreement or both Development Agreement and Bond Agreements have been waived, carries too much of legal and financial consequence to be decided by this Court's attempt to make an inconsistent verdict consistent.

CONCLUSION

The Court, after reading the pleadings and listening to the respective arguments on how to interpret the SVF to render its findings internally consistent, set out specifically to draft a Decision that would conclude that the findings were consistent. The Court's efforts are reflected in the first portion of this Decision, and admittedly to do it the Court had to strain to find an interpretation that would so conclude. Much to this Court's genuine disappointment, it cannot reach

such a conclusion. The findings of the jury as reflected in the SVF are irreconcilably inconsistent, both as to each other and to the ultimate conclusions one must draw to support such an argument.

ORDER

Accordingly, this Court finds that the findings of the jury are irreconcilably inconsistent and strikes the jury's Special Verdict and declares the trial a mistrial.

Counsel are instructed to contact the Court's clerk to schedule a Scheduling Conference.

Dated this 3rd day of June, 2010.

RANDALL N. SKANCHY
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, postage prepaid, to the following, this 3rd day of June, 2010:

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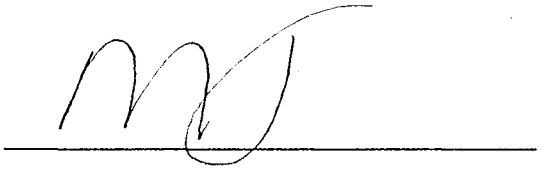


Tab B

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

TOOELE ASSOCIATES, L.P., et al.,

Plaintiffs,

vs.

TOOELE CITY, a municipal corporation, et al.,

Defendants.

TOOELE CITY, a municipal corporation, et al.,

Third Party Plaintiffs,

vs.

FORSGREN ASSOCIATES, INC., et al.,

Third Party Defendants.

JURY INSTRUCTIONS

Case No. 060919737

Judge Randall N. Skanchy

Members of the Jury: Attached are instructions numbered 1 through ~~23~~ 16 pgs, given to you at the beginning of this trial, and read to you at various points during the trial, and instructions ~~24~~ 24a through 69 pgs, which were presented to you at a later time in the proceedings. Taken together, these instructions govern your conduct and deliberations during the trial of this case and must be carefully considered and followed.

DATED this 3 day of June, 2009.

BY THE COURT:

RANDALL N. SKANCHY
DISTRICT JUDGE

GENERAL JURY INSTRUCTIONS

Jury Instruction No. 1:
General Instruction.

There are certain laws and rules which apply to this case. I'll explain them to you from time to time in order to give you the information that you need to fulfill your role as jurors at each stage of the trial. I will give you the first set of instructions at this point. You will receive further instructions before evidence is presented and the final set of instructions after the close of evidence. Please pay careful attention. Each of you has been given a copy of these instructions. This copy is yours to keep. As I read these instructions to you, you may follow along on your copy, or not, as you wish. Keep in mind the following points:

Obey the Instructions. You must obey the instructions. Some of these instructions give you information about how the trial will proceed, the rules that govern this process, and the roles of the participants, including your role as jurors. Other instructions tell you what the law is that you are to apply in reaching your verdict in this case. You must not reach decisions that go against the law. If any attorney makes statements of the law that differ from the instructions on the law that I give to you, you should disregard such statements and rely entirely on these instructions.

Many Instructions. There will be many instructions. All are important. Don't pick out one and ignore the rest. Think about each instruction in the context of all the others.

Gender–Singular/Plural. In these instructions, any references to "she" or "her" also include "he" or "him," or *vice versa*, as appropriate to this case; and the singular, such as "defendant" includes the plural "defendants," when appropriate.

Note Taking. The Bailiff has provided you with notepads and pens. You may take notes during the trial, but don't over do it, and don't let it distract you from following the evidence. The lawyers will review the evidence in their closing arguments and help you focus on what is most relevant to your decision. I also caution that notes are not evidence. Use them only to aid personal memory or concentration. Keep in mind that you must each arrive at a verdict independently, and one juror's memory of the evidence or opinion should not be given excessive consideration solely because that juror has taken notes.

Keep an Open Mind. Don't form an opinion about the ultimate issues in this case until you have listened to all the evidence and the lawyers' summaries, along with the final instructions on the law. Keep an open mind until your deliberations are completed.

Jury Instruction No. 2
What Rules Apply to Recesses

From time to time I will call for a recess. It may be for a few minutes, a lunch break, overnight or longer. During recesses, do not talk about this case with anyone; not family, friends or even each other. The Clerk may ask you to wear a badge identifying yourself as a juror so that people will not try to discuss the case with you. Don't mingle with the lawyers, the parties, the witnesses or anyone else connected with the case. You may say "hello", or exchange similar greetings or civilities with these persons, but don't engage in any conversations. Don't accept from or give to any of these persons any favors, however slight, such as rides or food. The lawyers and parties are naturally concerned to avoid any hint of improper contact with you, so don't think that they are being purposely rude if they avoid any interaction with you during the course of this trial. Don't read about this case in the newspaper or listen to any reports on television or radio, if there are any. Finally, don't form or express an opinion regarding any subject of the trial until you are sent out for deliberation at the end of the trial. These restraints are necessary for a fair trial.

Jury Instruction No. 3
The Roles of the Judge, the Jury and the Lawyers

The judge, the jury and the lawyers are all officers of the Court and play important roles in the trial.

Judge. It is my role as judge to decide all legal issues, supervise the trial and instruct the jury on the LAW that it must apply.

Jury. It is your role as the jury to follow that law and decide the factual issues. Factual issues generally relate to WHO, WHAT, WHEN, WHERE, HOW or similar things concerning which evidence will be presented.

An alternate juror has the same responsibilities as any other juror, as he may be required to take the place of one of the jurors in the panel in the event an original juror is unable to complete his service. Any alternate juror selected will be identified as such once the case has been presented and the jury is ready to retire to deliberate on a verdict.

Lawyers. It is the role of the lawyers to present evidence, generally by calling and questioning witnesses and presenting exhibits. It is the responsibility of each of the lawyers to be an advocate, and each will try to persuade you to accept her version of the facts and to decide the case in favor of her client.

Keep in mind that neither the lawyers nor I actually decide the case, because that is your role. Don't be influenced by what you think our personal opinions are; rather, you decide the case based upon the law explained in these instructions and the evidence presented in court.

Jury Instruction No. 4
Outline of the Trial

The trial will generally proceed as follows:

Opening Statements. The lawyers will outline what the case is about and indicate what they think the evidence will show.

Presentation of Evidence. The plaintiff will offer its evidence first followed by the defendant. Each side may also offer rebuttal evidence after hearing the witnesses and seeing the exhibits offered by the other side.

Additional Instructions on the Law. After each side has presented its evidence, I will give you additional instructions on the law that applies to this case.

Closing Arguments. The lawyers will then summarize and argue the case. They will share with you their respective views of the evidence, how it relates to the law and how they think you should decide the case.

Jury Deliberation. ?The final step is for you to retire to the jury room and deliberate until you reach a verdict. You will be given additional instructions about how you are to do that later.

Jury Instruction No. 5
What Is the Role of the Jury in this Case?

This is a civil trial, which means there is a disagreement between individuals or entities about their respective rights or obligations and what they owe each other, if anything. You must decide these questions in this case. Your decision is called a VERDICT. Your verdict must be based only on the evidence produced here in court. It must be based on facts, not on speculation. Don't guess about any fact. However, you may draw reasonable inferences or arrive at reasonable conclusions from the evidence presented.

Jury Instruction No. 6
What Is Evidence?

Evidence is anything that tends to prove or disprove the existence of a disputed fact. It can be testimony, or documents, or objects, or photographs, or stipulations, or certain qualified opinions, or any combination of these things. Some times the lawyers may agree that certain facts exist, this is called a stipulation. You should accept any stipulated facts as having been proved. In limited instances, I may take "judicial notice" of a well-known fact. If this happens, I will explain how you should treat it.

Instruction No. 7
Opinion Testimony

Under certain circumstances, witnesses are allowed to express an opinion. A person who by education, study or experience has become an expert in any art, science or profession, may give her opinion and the reason for it. A layperson (that is, a non-expert) is also allowed to express an opinion if it is based on personal observations and it is helpful to understanding his testimony or the case. You are not bound to believe anyone's opinion. Consider it as you would any other evidence, and give it the weight you think it deserves.

Jury Instruction No. 8
Conflicting Testimony of Experts

In resolving any conflict that may exist in the testimony of witnesses called to offer expert opinions, you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

Jury Instruction No. 9
What Is Not to Be Considered or Used as Evidence?

I've explained to you what evidence is. Now I'll tell you about some things which do not qualify as evidence or which, for some other good reason, you should not consider in reaching your verdict.

Lawyer Statements. What the lawyers say is not evidence. Their purpose is to give you a preview of expected evidence and to help you understand the evidence from their viewpoint. If a lawyer makes a statement about the evidence which is different from your own recollection of the evidence, you should rely on your own memory.

Personal Investigation. Evidence is not what you can find out on your own. You should not make any investigation about the facts in this case. Do not make personal inspections, observations or experiments. Do not view premises, things or articles not produced in court. Don't let anyone else do anything like that for you. Don't look for information on the internet, in law books, dictionaries, public or private records, or any other sources which are not produced in court.

Out of Court Information. Do not consider anything you may have heard or read about this case in the media or by word of mouth or any other out-of-court communication from any source. You must rely solely on the evidence that is produced and received in court.

Jury Instruction No. 10
The Judge Decides What Evidence Is Admissible

Sometimes a question will be raised about whether certain evidence is proper for the jury to consider. This type of question is called an OBJECTION. I rule on objections. If an objection is SUSTAINED the evidence is kept out and you should not consider it, nor should you guess as to what the evidence might have been or as to the reason for the objection. If an objection is OVERRULED the evidence comes in and you may consider it. If evidence which you have heard or seen is STRICKEN you must ignore it.

My decisions regarding the admission of evidence involve issues of law, and I am not giving any opinion as to which witnesses are or are not worthy of belief or as to which party should prevail in the case. Don't be concerned about the reasons for my rulings, and don't try to infer anything about the case from those rulings.

Further, if I do or say anything during the course of this trial that suggests to you that I favor the position of either party, whether in my rulings or otherwise, it is entirely unintentional; and you must not be influenced by that in any way.

Jury Instruction No. 11
How to Make Decisions about the Evidence

It will be your duty to determine your verdict relying solely on the evidence presented during the trial. For that purpose you should consider all of the evidence together, fairly, impartially and conscientiously, putting aside any bias, prejudice, or preconceptions.

Once evidence is admitted, you must decide three things about it: Whether it should be believed, how important it is, and what you can infer or conclude from it. An inference is a conclusion that logic, reason, or common sense leads you to draw from a fact or group of facts that the evidence has established.

Use your common sense as a reasonable person in making these decisions. Review and consider all the evidence. Don't imagine things which have no evidence to back them up. Consider the evidence fairly without any bias or sympathy toward either side.

Where there is conflicting evidence, you should try to reconcile the conflict so far as you reasonably can. Where the conflict cannot be reconciled, you are the final judges and must determine from the evidence what the facts are.

Jury Instruction No. 12
Deciding Whether to Believe a Witness

You are the sole judges of the importance of the evidence, the believability of the witnesses and the facts. There is no firm rule that I can give you for determining whether a witness is truthful. As each witness testifies, you must decide how accurate that testimony is and what weight to give it, using your own good judgment and experience in life. In evaluating testimony, it may help you to ask yourself questions such as these:

Personal Interest. Does the witness have a personal interest in how the trial comes out?

Other Bias. Does the witness have some other bias or motive to testify a certain way?

Demeanor. What impression is made by the witness's appearance and conduct while answering questions?

Consistency. Did the witness make conflicting statements or contradict other evidence?

Knowledge and Memory. Did the witness have a good opportunity to know the facts and the ability to remember them?

Reasonableness. Is the testimony reasonable in light of human experience?

You may also apply any other common sense yardstick to the testimony you hear and the other evidence you receive. You are not required to believe any witness or all that a witness says. You are entitled to believe one witness as against many or many as against one, in accordance with your honest convictions.

Jury Instruction No. 14
Depositions.

Depositions may be received in evidence. Depositions contain sworn testimony of a witness that was given previously, outside of court, with the lawyer for each party being entitled to ask questions. Testimony provided in a deposition may be read to you in court or may be seen on a video monitor. You should consider deposition testimony the same way that you would consider the testimony of a witness testifying in court.

Utah court rules allow a witness to make corrections to his or her deposition testimony, provided that the witness signs a written statement reciting the reasons for making them.

Jury Instruction No. 15
Who Is Responsible to Convince the Jury?

In a civil trial, the party making a claim is responsible to prove it. This responsibility is sometimes called a "burden" or a "burden of proof."

Jury Instruction No. 16
Stipulated and Otherwise Established Facts.

A stipulation is an agreement. Unless I instruct you otherwise, when the lawyers on both sides stipulate or agree to a fact, you must accept the stipulation as evidence and regard that fact as proved.

Instruction No. 16a: Instructions on the Law that Applies to This Case.

The clerk has attached to your copy of these instructions some additional pages which contain instructions relating to the particular laws or rules that apply in this case. These additional instructions begin with instruction number 27. We will read those after completing our review of the following instructions which relate essentially to the procedure that you should follow.

Jury Instruction No. 17

STIPULATED FACTS

A stipulation is an agreement. Unless I instruct you otherwise, when the lawyers on both sides stipulate or agree to a fact, you must accept the stipulation as evidence and regard that fact as proved.

The following facts are stipulated:

1. Plaintiff Tooele Associates Limited Partnership ("Tooele Associates") is a Washington limited partnership that owns property and does business in the Overlake Development in Tooele, Utah.

2. Defendant Tooele City (the "City") is a municipality and political subdivision of the State of Utah.

3. On November 15, 1995, Tooele City and Tooele Associates entered into an "Annexation Agreement".

4. On December 18, 1997, Tooele Associates and the City entered into the "Development Agreement for Overlake Project Area Tooele City, Tooele County, Utah by and between: Tooele City, Utah and Tooele Associates, Limited Partnership, a Washington Limited Partnership" (the "Development Agreement").

5. The Development Agreement was amended five times in writing:

   - ☐ On April 21, 1998, the City approved Amendment No. 1 to the Development Agreement.
   - ☐ On July 1, 1998, the City and Tooele Associates entered into Amendment No. 2 to the Development Agreement.
   - ☐ On October 6, 1999, the City and Tooele Associates entered into Amendment No. 3 to the Development Agreement.
   - ☐ On November 15, 2001, the City and Tooele Associates entered into Amendment No. 4 to the Development Agreement.
   - ☐ On January 9, 2002, the City Council approved the Corrected and Restated Amendment No. 4 to the Development Agreement.

- ☐ On July 3, 2007, the City and Tooele Associates entered into Amendment No. 5 to the Development Agreement.

6. To date, Tooele Associates has recorded and developed several plats within the Overlake Project Area, including Overlake 1A, 1B, 1C, 1D, 1E, 1G, 1F and 1J.

7. The Overlake Golf Course Plat was approved by Tooele City on September 16, 1998 and was recorded by the Tooele County Recorder on October 9, 1998.

8. After Tooele City's approval, and the recordation of the Overlake Golf Course Plat, more real property was added to the golf course for the clubhouse, parking lot and associated facilities.

Instruction No. 18 : How Convinced Should the Jury be Before Making a Decision?

The party making a claim is responsible to prove the claim by a preponderance of evidence. This means that, after considering and comparing all the evidence presented in court, the convincing weight thereof must be in favor of the party making the claim. If the evidence is evenly balanced or if the balance is not in favor of the claimant, then the claimant has not met its burden as to that claim.

Instruction No. 19: Jurors Must Follow the Instructions.

The instructions that I give you are the law, and your oath requires you to follow my instructions even if you disagree with them.

Instruction No. 20: What to Take With You Into the Jury Room.

You may take the following things with you when you go into the jury room to discuss this case:

a. All exhibits admitted in evidence;

b. Your notes (if any);

c. Your copy of these instructions;

d. Your trial binder; and

e. The verdict form or forms that will be given to you.

Instruction No. 21: What to Do in the Jury Room.

The first thing you should do in the jury room is choose a person to be in charge. This person is called the "Foreperson." The Foreperson's duties are:

a. To keep order and allow everyone a chance to speak;

b. To represent the jury in any communications you make; and

c. To sign your verdict form and bring it back into court.

In deciding what the verdict should be, all jurors are equal. The Foreperson has no more power than any other juror.

Instruction No. 22: Consider Each Other's Opinions, Then Reach Your Own Decision Based Upon Honest Deliberation.

It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of opinion or to announce a determination to stand for a certain verdict. When that is done at the outset, a person's sense of pride may block appropriate consideration of the case. Use your common memory, your common understanding and your common sense. Talk about the case with each other as you ponder and deliberate.

Your verdict must be your own. Don't make a decision just to agree with everyone else. However, you should respect and consider the opinions of the other jurors. If you are persuaded that a decision you initially made was wrong, don't hesitate to change your mind. Help each other arrive at the truth. In an attempt to reach a decision, you may not resort to chance or any form of decision-making other than honest deliberation.

Instruction No. 23: If You Have Questions During Deliberation.

If you think you need more information or a clarification, write a note and give it to the bailiff. I will review it with the lawyers. We will answer your question whenever appropriate. However, these instructions should contain all the information you need to reach a verdict based upon the evidence that has been presented to you. You should understand that no further evidence can be provided to you.

Instruction No. 24: Focus on This Case Alone.

Your duty is to decide this case and this case alone. You should not use this case as a forum for correcting perceived wrongs in other cases, or as a means of expressing individual or collective views about anything other than the issues you are called upon to decide. Your verdict should reflect the facts as found by you applied to the law as explained in these instructions and should not be distorted by any outside factors or objectives.

The final test of the quality of your service will be the verdict you return. You will make an important contribution to justice and your community if you focus exclusively on this case and return a just and proper verdict.

Instruction No. 25: How to Report Your Verdict.

When you have reached a verdict, the Foreperson should date and sign the verdict form which corresponds to your decision. Then, notify the bailiff that you are ready to return to court.

Instruction No. 26: What Happens After the Verdict Has Been Reported?

After you have given your verdict to the Judge, he or the clerk may ask each of you about it to make sure you agree with it. Then you will be excused from the jury box and you may leave at any time. You may remain in the courtroom, if you wish, to watch the rest of the proceedings, which should be quite brief.

After you are excused, you may talk about the case with anyone. Likewise, you are not required to talk about it. If anyone attempts to talk to you about the case when you don't want to do that, please tell the Court Clerk. Finally, if you do decide to discuss the case with anyone, keep in mind that your fellow jurors freely stated their opinions in the jury room with the understanding that they were speaking in confidence. Please respect the privacy of the views of your fellow jurors.

Instruction No. 27: Tooele City's Breach of Contract Claims Against Tooele Associates.

Tooele City claims that Tooele Associates breached the Development Agreement and its amendments, the Annexation Agreement, and the Bond Agreements and their amendments by not performing its obligations as follows:

1. By failing to complete the public improvements in each phase of the Overlake development, except for Phase 1A, in accordance with the terms of the Annexation Agreement, the Development Agreement and its amendments, and the Bond Agreements and their amendments;

2. By selling most of the undeveloped property in Overlake to third parties and partially assigning the Development Agreement without Tooele City's prior written consent;

3. By failing to set aside 97 acres for public schools and sell land to the Tooele County School District at negotiated prices;

4. By failing to pay amounts owed for the water used to irrigate the Overlake Golf Course; and

5. By failing to comply with the Development Agreement's golf course size specifications.

Tooele City claims that it has been damaged as a result and wants Tooele Associates to pay it money to compensate it for the damages it claims to have suffered.

Tooele Associates denies Tooele City's claims and in its defense claims that (1) Tooele City waived, or should be estopped from asserting, its claims; (2) Tooele Associates substantially performed the Development Agreement and Bond Agreements and committed no material breach of those Agreements; (3) Tooele Associates did not cause any damages incurred by Tooele City; (4) Tooele City did not comply with the Development Agreement's requirements for secondary water billing; (5) any breach regarding the size of the Links at Overlake Golf Course was not material; (6) Tooele City consented to, or ratified, Tooele Associates' performance of the Development Agreement; and (7) Tooele City failed to mitigate its damages.

Instruction No. 28: Breach of Contract.

A party to a contract breaches the contract if it fails to do what it promised to do in the contract.

Instruction No. 29: Elements for Breach of Contract.

In order to recover damages, the party claiming breach of contract must prove each of these four things:

(1) that there was a contract between the party claiming breach and the party that allegedly breached the contract;

(2) that the party claiming breach did what the contract required it to do, or that it was excused from performing its contract obligations;

(3) that the other party breached the contract by not performing its obligations; and

(4) that the party claiming breach was damaged because the other party breached the contract.

Instruction No. 30: Material Breach.

You must decide whether there was a material breach of the Development Agreement. A breach is material if a party fails to perform an obligation that was important to fulfilling the purpose of the contract. A breach is not material if the party's failure was minor and could be fixed without difficulty.

Instruction No. 31: Partial Breach.

If one of the parties to a contract did some but not all of the things it promised to do under that contract, then the other party may recover damages related only to what the party failed to do under the contract.

Instruction No. 32: Implied Covenant of Good Faith and Fair Dealing.

All contracts contain an unwritten or implied promise that the parties will deal with each other fairly and in good faith. This means that the parties have promised not to intentionally do anything to injure each other's right to receive the benefits of the contract. To decide if one party violated this unwritten promise, you should consider whether its actions were consistent with the agreed common purpose and justified expectations of the other party in light of the contract language and the dealings between and conduct of the parties.

There are some limits to this unwritten promise that you need to keep in mind.

First, this unwritten promise between the parties to deal fairly with each other and in good faith does not establish new, independent rights or duties that the parties did not agree to.

Second, this unwritten promise does not create rights and duties that are inconsistent with the actual terms of the contract.

Third, this unwritten promise does not require either party to use a contract right in a way that will be harmful to themselves simply to benefit the other party.

Finally, you cannot use this unwritten promise to achieve an outcome that you believe is fair but is inconsistent with the actual terms of the contract.

If you find that a party violated this unwritten promise to deal fairly and in good faith, then that party breached the contract.

Jury Instruction No. 33

When Performance Is Not Excused by Other Party's Non-performance.

Tooele Associates or Tooele City cannot by a willful act or omission make it difficult or impossible for Tooele Associates to perform under the terms of the Development Agreement or the Bond Agreements and then be excused from performing their obligation because the other party did not perform.

If you decide that Tooele Associates or Tooele City was willing and able to perform its obligation, but that it could not perform the obligation because of something that the other party purposely did or failed to do, then its was excused from performing its obligation.

Instruction No. 37: Integrated Contracts.

The Development Agreement is an integrated contract. That means that when you interpret the Development Agreement, you cannot consider conversations, representations, or statements made before or at the time the Development Agreement was made that would vary or add to the terms of the Development Agreement.

In addition, the fact that the Development Agreement is an integrated contract obviates any expectation a party may now assert that it expected under the Development Agreement unless that expectation is an express term of that Agreement.

Instruction No. 35: Substantial Performance.

Tooele Associates claims that even though it did not do everything exactly as the Development Agreement required, it substantially performed the Development Agreement and, therefore, is entitled to a ten-year extension of the Development Agreement's term and to recover from Tooele City because, Tooele Associates claims, Tooele City breached the Development Agreement. Tooele Associates can only recover under the Development Agreement if it substantially performed all of its obligations under the terms of that Agreement.

Tooele Associates' failure to do everything exactly as promised under the Development Agreement does not prevent it from recovering damages unless (1) it willfully departed from the terms of the Development Agreement; (2) it acted in bad faith; or (3) its variance from the strict and literal performance of the Development Agreement involved more than technical or unimportant omissions or defects.

Instruction No. 36 : Burden of Proof for Substantial Performance.

Tooele Associates bears the burden of proving that it substantially performed its obligations under the Development Agreement.

Instruction No. 37: Assignment.

An assignment transfers a party's rights and obligations under a contract to another.

Instruction No. 38: Nonsignatory.

No signature is required for a person or entity to become party to a contract. Performance may bind a party to a contract that it has not signed.

Instruction No. 39: Development Discretion.

Tooele City, by virtue of its municipal powers granted to it by the State of Utah, has great latitude and discretion in effectuating its services to the public and to propose and enforce plans affecting Tooele City and its citizens. If the discretion Tooele City enjoys in regulating growth in its community is not expressly proscribed by the terms of the Development Agreement, then you cannot interject implied covenants to limit the exercise of such discretion.

Instruction No. 40: Damages – Reasonable Certainty.

Damages are only recoverable for loss in an amount that the evidence proves with reasonable certainty, although the actual amount of damages need not be proved with precision. Any alleged damages which are only remote, possible or a matter of guess work are not recoverable.

Instruction No. 41: Mitigation and Avoidance.

Tooele Associates and Tooele City each claim that the breach of contract claims against them fail because the party claiming breach of contract against them failed to mitigate its damages.

The party claiming breach had a duty to mitigate, that is, to minimize or avoid, the damages caused by the breach. The party claiming breach may not recover damages that it could have avoided without undue risk, burden or humiliation. Likewise, the party claiming breach may not recover the damages for losses that were caused by or made worse by its own action or inaction.

The party claiming breach has a right to recover damages if it has made a reasonable but unsuccessful effort to avoid loss.

The party claiming breach had no obligation to mitigate its damages by taking action that the other party refused to take. If the other party had the primary responsibility to perform obligations under the contract and had the same opportunity to perform those obligations and the same knowledge of the consequences as the party claiming breach, the other party cannot succeed in a claim that the party claiming breach failed to perform those obligations.

Instruction No. 42: Enforcing Traffic Laws on Private Streets.

Tooele City may not regulate traffic on private roads, and may only regulate traffic on public roads or streets within its jurisdiction.

Instruction No. 43: Definition of Public Improvements.

Public improvements are all public utility infrastructure improvements, whether on or off-site, and including all sewer, storm water, culinary water, publicly-owned secondary water, street lights and associated electrical, streets, curbs, gutters, sidewalks, alleys, easements and rights-of-way, street signs, monuments and markers, regulatory signs, landscaping (including park strip and trees), and other improvements considered public utility infrastructure improvements in the construction trade which are found within typical subdivision and site plan construction documents.

Jury Instruction No. 44

Tooele City Code & Ordinances

Certain portions of the Tooele City Code and Tooele City Ordinances are attached to this instruction. These portions of the City's Code and Ordinances may have some relevance to the issues presented by this case and are provided for your reference.

City Code § 7-19-35;
City Code § 7-19-37;
City Code § 1-6-9; and
City Code § 7-19-12.
~~Procedures for Final Subdivision Plat Approval~~
Procedures for Accepting Public Improvements
Ordinance 98-32
Ordinance 94-56
City Code 7-19-8

The Assistant shall, with the approval of the Mayor, appoint all employees and members of the City departments and fix their salaries within any adopted salary schedules, except as otherwise provided. (Ord. 67-3, 08-14-67)

1-6-9. Sign for city.

The Mayor shall sign all contracts, leases, deeds and other writings on the part of the City as authorized by resolution of the Council or as required by law. Notwithstanding, the Mayor shall have authority to sign all contracts on the part of the City which are administrative in nature and which are for less than $8,000.00, without further City Council authorization.

He shall appoint all committees authorized by ordinance or resolution of the Council.

He may grant such privileges and fee licenses as are authorized by the provisions of this Code.
(Ord. 2000-17, 08-16-2000); (Ord. 67-3, 08-14-67)

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof. (Ord. 77-18, 10-19-77)

7-19-5. Rules or interpretation.

(1) Words used in the present tense shall include the future; and words used in the singular shall include the plural number, and the plural the singular.

(2) "Shall" is mandatory and not discretionary.

(3) "May" is permissive.

(4) "Lot" shall include the words "plot, piece and parcel".

(5) "Used for" shall include the phrases "arranged for, designated for, intended for, maintained for and occupied for". (Ord. 77-18, 10-19-77)

7-19-6. Repealed. (Ord. 94-26, 05-12-94)

7-19-7. Applicability of this chapter.

The procedures and requirements of this Chapter must be followed:

(1) By every person creating a subdivision as defined herein.

(2) By every person who desires to dedicate any street, alley or other land for public use, even though said dedication is not a subdivision as defined herein.

(3) By every person who desires to divide a tract or parcel of land into two (2) parts for the purpose, whether immediate or future, of sale or of building development, when in the discretion of the Planning Commission the circumstances surrounding said division of land are such that the public interests would not be protected otherwise. For the purpose of this paragraph (3), the Building Inspector shall refer any such proposed division of land to the Planning Commission which he feels comes within whatever informal guidelines the Planning Commission shall issue. The Planning Commission shall then determine whether the procedures and requirements of this Chapter should apply.
(Ord. 81-24, 06-11-81)

7-19-8. Procedure for approval of preliminary plan.

(1) Prior to the submission of any preliminary plan, the applicant shall confer with the Building Official of the City and such other City officials as he shall request, including the Planning and Zoning Commission when convened. The purpose of such preapplication conference is to permit the applicant and the City to review the proposed land development activity and its use, the site, area of potential conformity or conflict with the City's development policy, and the process by which the proponent may proceed to seek a permit for the proposed land development activity sought by the applicant. The preapplication conference shall concern, but need not be limited to a discussion of the following:

(a) The site: Its size, location and accessibility; land use and development in the neighboring area; and policy constraints and opportunities.

(b) The proposed use or land development activity: The type of development proposed and the placement of buildings or other improvements on the site; the density or intensity of use of the development; the type and amount of public facilities likely to be required by the development, and method of providing the same; existing public improvements which are anticipated to benefit the proposed use or land development activity, and which, pursuant to Section 7-19-13 of this Code, subject the applicant to a reimbursement requirement; the capital improvements program, the location, type and method of maintenance of open space, public improvements, common areas and facilities; proposed contouring and landscaping; proposed internal vehicular circulation system and parking.

(c) Policy consideration: The policy plan or master plan of the City to the extent the same is articulated in writing shall be adhered to in the preliminary plan to be submitted by the applicant. Discussion of the City's master plan or policy plan, impact statement requirements, submission requirements and other applicable provisions of the City Code, County regulations and State law will also be discussed.

The preapplication conference shall be held by the applicant and the City at a mutually agreeable time during normal working hours, unless an additional conference with the Planning and Zoning Commission is requested, which conference may be in the evening at a time when the Planning and Zoning Commission shall be convened.

(2) The subdivider will then cause to be prepared twelve (12) copies of the preliminary plan which shall include all of the property to be subdivided by the applicant as well as all other property owned or controlled by the applicant which is adjacent to or considered contiguous to the portion to be subdivided. The subdivider shall also prepare such other supplementary material as was specified by the City in the preapplication conference, as well as a written application for approval of the preliminary plan. Said written application shall contain lines for the signatures of the members of the Planning and Zoning Commission, Tooele City Fire Chief, Tooele City Police Chief, Tooele Postmaster, City Attorney, Building Official, Superintendent of Tooele County Schools, and the Tooele City Health Officer.

(3) At least fifteen (15) days prior to a regular meeting of the Planning and Zoning Commission, the Building Official shall refer five (5) copies of the preliminary plan to the members of the Commission, one (1) copy each to the Postmaster, Fire Chief, Police Chief, Attorney, Superintendent of Schools, Accessibility Committee member, and Health Officer. Said individuals shall submit their opinions regarding the proposed development to the Building Official prior to the convening of the Commission or at the said meeting if they attend in person. At said meeting, the applicant and the Commission shall review the preliminary plan for compliance with these regulation, and other ordinances of the City and shall, within two (2) months from the first

regular meeting following the said meeting:

(a) Approve or disapprove the proposed preliminary subdivision plan and submit its written recommendations of the City Engineer to the City Council. An application shall not be approved until receiving all the signatures listed in subsection (2) above.

(b) If the Planning and Zoning Commission finds that changes, additions or corrections are required on the preliminary plan, the Commission shall so advise the subdivider in writing. The subdivider may resubmit the preliminary plan to the Commission without paying an additional fee, for its consideration at the next regular meeting of said Commission. The Commission shall, at said meeting, approve or disapprove the preliminary plan and submit its recommendations in writing to the City Council.

(4) If the plat is approved by the Commission, the City Council shall accept or reject said plan within one (1) month after its next regular meeting following the action of the Planning and Zoning Commission. The applicant and the Council may mutually agree to extend the one (1) month period.

(5) The following qualifications shall govern approval of the preliminary plan:

(a) Approval of the preliminary plan by the Planning and Zoning Commission is tentative only, involving merely the general acceptability of the layout as submitted.

(b) Approval of the preliminary plan shall be effective for a maximum period of one (1) year unless, prior to the one-year period lapsing,, the Council grants an extension, not to exceed six (6) months, upon written request of the developer. The request for said extension shall not require an additional fee, or the submittal of additional copies of the preliminary plan of the subdivision. If the final plat is not submitted to the Building Official prior to the expiration of said one (1) year period which begins to run from the date that the preliminary plan is approved by the Council, the approval of the said preliminary plan automatically lapses and is void and of no further force or effect. Thereafter, the developer must recommence the application process as then in effect. (Ord. 2005-06, 05-18-2005); (Ord. 98-35, 10-07-98); (Ord. 98-17, 07-01-98; Ord. 77-18, 10-19-77)

7-19-9. Plats and data for approval of preliminary plan.

The following data and plats are required for approval of the preliminary plan:

(1) Topographic data required as a basis for the preliminary plat, in subsection (B) below, shall include existing conditions as follows, except when otherwise specified by the Planning and Zoning Commission:

(a) Boundary line: Bearing and distances of all boundary lines of the subdivision as proposed.

(b) Easements: The location, width and purpose of all easements of the subdivision.

(c) Streets on and adjacent to the tract: Name and right-of-way width and location of all streets of the proposed subdivision; type, width and elevation of surfacing; any legally established centerline elevations, walks, curbs, gutters, culverts, etc.

(d) Utilities on and adjacent to the tract: Location, size of sanitary sewers on or adjacent to the tract; location and size of all water mains on or adjacent to the tract; if water mains and sewers are not on or adjacent to the tract, indicate the direction and distance to, and the size of nearest facilities.

(e) The preliminary plan of the subdivision shall be accompanied by:

(1) either a preliminary plan for sewer and water lines, or a written statement setting forth the general plans for such improvements and indicating the method to be used to overcome particular problems that may be encountered with the development of the proposed system.

(2) where the sanitary sewage facilities are proposed to be provided by individual septic systems, percolation tests shall be made on the property and a report on these tests prepared by a professional engineer licensed to practice in the State of Utah. These tests shall be made at a frequency of one (1) test hole for each five (5) lots or each three (3) acres, whichever requires the greater number of test borings.

(3) a letter from each utility company involved in the subdivision, addressed to the Planning and Zoning Commission stating that the preliminary plan has been reviewed and setting forth the utility company's comments regarding the utility service design and easements.

(4) an exact copy of a preliminary report of a title insurance company, a title insurance policy or an attorney's opinion brought to date of the application, setting forth the names of all property owners of property included in the subdivision as shown on the preliminary plat, as well as all mortgages, judgments, liens, easements, contracts and other clouds affecting title to said premises. The City may require all persons having an interest in the premises, as disclosed by the report, policy or opinion, to join in and approve of the subdivision application.

(5) when a proposed street will intersect a state or county highway or a railroad, written consent of the appropriate authorities having jurisdiction over said highway or railroad shall be submitted.

(6) all information required by the FHA when the subdivision will be submitted to that agency for feasibility and approval under a federal program.

(7) a written statement outlining any existing public improvements which are anticipated to benefit the proposed use or land development activity, and which, pursuant to Section 7-19-13 of this Code, subject the applicant to a reimbursement requirement.

(f) Other conditions on the tract: Water courses, marshes, rock outcropping, wooded areas, isolated preservable trees one (1) foot or more in caliper at one (1) foot above ground level, houses, barns, shacks and other significant features.

(g) Other conditions on adjacent land: Approximate direction and gradient of ground slope, including any embankments or retaining walls, character and location of buildings, railroads, power lines, towers and other nearby nonresidential land uses or adverse influences and ownership of adjacent unplatted land (for adjacent platted land, refer to the subdivision plats by

for approval by submitting the same to the City Recorder at least fifteen (15) days before a regular meeting of the Council.

(b) Action must be taken by the Council within two (2) months after the meeting at which the final plat and all drawings, maps and other documents regarding the development have been submitted for its approval. The Council may extend the two (2) month period upon a two-thirds (2/3) vote of its members.

(6) Recordation. Tooele city will record the final plat with the Tooele County Recorder pursuant to Section 7-19-39, below.

(Ord. 2005-06, 05-18-2005); (Ord. 2004-02, 01-07-04); (Ord. 98-35, 10-07-98); (Ord. 98-16, 07-01-98; Ord. 78-28, 11-21-78; Ord. 77-18, 10-19-77)

7-19-11. Plats and data for final approval.

(1) The final plat shall be drawn in ink on tracing cloth on sheets not to exceed thirty-six (36) inches by forty-eight (48) inches and shall be at a scale of one hundred (100) feet to one (1) inch. Where necessary, the plat may be on several sheets accompanied by an index sheet showing the entire subdivision. For large subdivisions, the final plat may be submitted for approval progressively in contiguous sections satisfactory to the Planning and Zoning Commission. The final plat shall show the following:

(a) Primary control points, approved by the City Engineer, or descriptions and "ties" to such control points, to which all dimensions, angles, bearings and similar data on the plat shall be referred.

(b) Tract boundary lines, right-of-way lines of streets, easements and other rights-of-way and property lines of residential lots and other sites, with accurate dimensions, bearings and deflection angles and radii, arcs and central angles of all curves.

(c) Name and right-of-way width of each street or other right-of-way.

(d) Location, dimensions and purpose of any easements.

(e) Number to identify each lot or site and block.

(f) Purpose for which sites, other than residential lots, are dedicated or reserved.

(g) Proposed building set-back lines on all lots and other sites.

(h) Location and description of monuments.

(i) Certification by a registered land surveyor licensed by the State of Utah certifying to the accuracy of the survey and plat.

(j) Certification of the County Treasurer showing that all taxes and special assessments due on the property to be subdivided have been paid in full.

(k) Dedication by the owners of the tract of all streets, easements and rights-of-way to the public, and other proposed public way or space shown on the plat.

(l) Certification of title showing that the applicant is the owner of the agent of the owner.

(m) Proper form for the approval of the Council, with space for the signatures of the Council members.

(n) Approval by signatures of the Council, Planning and Zoning Commission, Health Officer, City Attorney and such other persons concerned with the approval thereof or the specifications for utility installations.

(o) Name of the subdivision.

(p) Location by section, township and range.

(q) Title, scale, north arrow and date.

(2) Cross sections and profiles of streets showing grades. The scales and elevations shall be based on the U.S.G.S. Datum Plane.

(3) Protective covenants in form for recording.

(Ord. 2005-06, 05-18-2005); (Ord. 98-35, 10-07-98); (Formerly Repealed by Ord. 93-04, 05-04-93)

7-19-12. Public Improvements; bonds and bond agreements.

Public improvements shall be completed pursuant to the following procedure:

(1) After approval of the preliminary plan, the subdivider shall present plans and specifications for all public improvements to the city Engineer for review and approval.

(a) If engineering plans require substantial changes from the approved preliminary plan, the subdivider shall revise and re-submit the public improvements plans and specifications.

(b) Re-submissions shall not require the payment of additional fees to the City. The City, however, shall not be responsible for the cost of any revisions or for any costs incurred due to delays caused by requiring the revisions.

(c) No public improvements may be constructed prior to final plat approval.

(2) Upon approval of the plans and specifications by the City Engineer, the final plat shall be submitted to the City Council for approval, modification, or disapproval.

(3) All public improvements shall be completed within one (1) year from the date of final plat approval. The City Council may grant a maximum of two six (6)-month extensions upon receipt of a written petition and upon a finding of unusual circumstances. Petitions for extension must be filed with the City Recorder prior to expiration of the applicable one (1)-year period or six (6)-month extension.

(4) Within ninety (90) days of final plat approval, the subdivider shall submit and execute a bond and bond agreement compliant with this Section. The purpose of the bond and bond agreement is to insure completion of all public improvements required to be installed in the subdivision and to warrant the quality of their construction. No final plat may be recorded prior to the execution of a bond agreement. Failure to provide the required bond and fully execute the required bond agreement within the specified ninety (90) days shall result in the automatic revocation of, and shall void, the final plat approval.

(5) Bond agreements shall be in the form and contain the provisions approved by the City Attorney. The agreement shall be signed by the Mayor, the City Attorney, and the City Engineer. The agreement shall include, without limitation, the following:

(a) Incorporation by reference of the final plat, final plat documents, public improvements plans and specifications, and all data required by this Chapter which

is used by the City Engineer to estimate the cost of the specific public improvements.

(b) Incorporation by exhibit of the City Engineer's estimate of the cost of the specific public improvements.

(c) Completion of the public improvements within the period of time described in subsection (3), above.

(d) Completion of the public improvements to the satisfaction of City inspectors and according to City standards, as established by the Tooele City Code and City policies.

(e) Establishment of the bond amount, which shall be equal to the subdivider's estimated cost of the public improvements to be installed, as reviewed an approved by the City Engineer or designee, plus twenty percent (20%) of the estimated costs as a reasonable contingency.

(f) The City shall have exclusive control over the bond proceeds, which may be released to the subdivider only upon written approval of the City Attorney.

(g) The bond proceeds may be reduced upon written request of the subdivider as the improvements are installed and upon approval by City inspectors on a City inspection report form. The amount of the reduction shall be determined by reference to the City Engineer's estimate attached to the bond agreement, with assistance from the City Engineer, as necessary. Such requests may be made only once every thirty (30) days. All reductions shall be by the written authorization of the City Attorney.

(h) Bond proceeds may be reduced by no more than eighty percent (80%) of the total bond amount, the remaining twenty percent (20%) being retained to guarantee the warranty and maintenance of the improvements as provided in Sections 7-19-12(7) and 7-19-35, herein.

(i) If the bond proceeds are inadequate to pay the cost of the completion of the improvements according to City standards for whatever reason, including previous reductions, then the subdivider shall be responsible for the deficiency and no further building permits shall be issued in the subdivision until the improvements are completed or, with City Council approval, a new bond and bond agreement have been executed to insure completion of the remaining improvements.

(j) If, after expiration of the bond agreement time period, the bond proceeds are not transferred to the City within thirty days (30) of the City's written demand, then the City's costs of obtaining the proceeds, including the City Attorney's Office costs and any outside attorney's fees and costs, shall be deducted from the bond proceeds.

(k) The subdivider agrees to hold the City harmless from any and all liability which may arise as a result of those public improvements which are installed until such time as the City accepts the public improvements as provided in this Chapter.

(6) Bond agreements shall be one of the following types:

(a) An irrevocable letter of credit with a financial institution federally or state insured, upon a current standard letter of credit form, or including all information contained in the current standard letter of credit form..

(b) A cashier's check or a money market certificate made payable only to Tooele City Corporation.

(c) A guaranteed escrow account from a federally or state insured financial institution, containing an institution guarantee.

(7) Warranty. The Subdivider shall warrant and be responsible for the maintenance of all improvements for one (1) year following their acceptance by Resolution of the City Council, and shall guarantee such warranty and maintenance in the above-described bond agreements.

(8) In addition to other fees, the subdivider shall pay a $250.00 administrative fee to Tooele City to administer the bonds and bond agreements.

(Ord. 2004-02, 01-07-04); (Ord. 2000-24, 12-06-2000); (Ord. 98-21, 07-01-98); (Ord. 96-26, 12-04-96); (Ord. 77-18, 10-19-77)

7-19-13. Applications for Reimbursement.

(1) Definitions. All words and phrases in this Section beginning in capital letters shall have the meanings given them in Tooele City Code Section 7-1-5.

(2) Application for Reimbursement. Developers required to install Eligible Public Improvements may be entitled to reimbursement pursuant to this Section, provided that:

(a) the Construction Costs of the Eligible Public Improvements required by the City as a condition of development approval exceeds the Construction Cost of the City's required minimum standards and specifications for the Eligible Public Improvements by ten percent (10%) or more; and,

(b) the Cost Differential exceeds $5,000; and

(c) the Eligible Public Improvements are constructed within the Tooele City Corporate Limit; and

(d) the Subsequent Developer's development receives City approval within eight (8) years from the date of City approval of the development for which the Eligible Public Improvements were required; and,

(e) the Prior Developer files an Application for Reimbursement in the office of the Director of Public Works or City Engineer.

(3) Application for Reimbursement.

(a) Developers satisfying the above criteria may apply for reimbursement for recovery of a pro-rata share of the Cost Differential, minus the Depreciation Value, from a Subsequent Developer to the extent that the Subsequent Developer did not share in the Construction Cost of the Eligible Public Improvements.

(b) Notwithstanding other provisions of this Section to the contrary, subdivisions of ten (10) lots or less, or single-lot developments, that are required by the City to fully improve a road right-of-way (i.e. road base, road surface, curb, gutter) are eligible to apply for and receive reimbursement for the Construction Cost of that portion of the road improvements that directly benefit subsequent development located adjacent to the road improvements, minus the Depreciation Value.

(4) The Application for Reimbursement shall be made on a form approved by the City Attorney, and shall include the following information:

(a) a brief description of the Eligible Public Improvements which may directly benefit future development; and,

(b) an engineer's written estimate of the

provisions of Section 7-19-12, Tooele City Code, in the amount of $200 per required park strip tree; or

(2) make a non-refundable payment to Tooele City in the amount of $200.00 per required tree, which shall be used by the Director of Parks and recreation to plant trees within the park strips of the subdivision.

(3) Protective screen planting may be required to secure a reasonably effective physical barrier between residential properties and adjoining uses which minimizes adverse visual, auditory, and other conditions. The screen planting plan shall be approved by the Planning Commission and the City Council upon the recommendation of the Community Development Director and Director of Parks and Recreation.
(Ord. 2005-03, 02-02-05); (Ord. 2000-10, 06-21-2000); (Ord. 98-26, 08-05-98); (Ord. 87-24, 01-02-88); (Ord. 77-18, 10-19-77) (Ord. 87-24, 01-02-88); (Ord. 77-18, 10-19-77)

7-19-30. Sanitary sewers.

Sanitary sewers and service laterals shall be installed to serve all properties and lots in the subdivision, including properties reserved for public use or purchase. The provisions of Title 8, Chapter 2, Tooele City Code, shall apply to the installation design and construction of all sanitary sewers and service laterals in subdivisions. (Ord. 87-24, 01-02-88; Ord. 77-18, 10-19-77)

7-19-31. Engineering specifications.

The owner or subdivider shall install sanitary sewers, water supply system, street grading and pavement, alleys, crosswalks, public utilities and street lighting in accordance with applicable ordinances and standards of construction in the City. (Ord. 77-18, 10-19-77)

7-19-32. Water service.

(1) The provisions of Title 9, Chapter 4. Tooele City Code, shall apply regarding all pipes, service laterals and appurtenances provided in a subdivision.

(2) All lots and properties including property reserved for public use or purchase shall be supplied with water service sufficient to meet the future anticipated uses of said property. (Ord. 87-24, 01-01-88; Ord. 77-18, 10-19-77)

7-19-33. Trench backfill.

All trench work shall conform to the provisions of Title 4, Chapter 9, Tooele City Code. (Ord. 87-24, 01-02-88; Ord. 77-19, 10-19-77)

7-19-34. Filing of engineering plans and review fee.

(1) Four (4) complete sets of engineering plans and specifications or required land improvements together with an estimate of the cost of improvements, said plans and specifications to bear the seal of a Utah registered professional engineer along with a signed statement to the effect that such plans and specifications have been prepared in compliance with this Chapter and pursuant to good engineering practices shall be submitted to the Building Official prior to the approval of the final plat by the Planning and Zoning Commission. Said plans shall be drawn to a minimum horizontal scale of five feet (5') to the inch. Plans shall show profiles of all utility and street improvements with elevations referring to the U.S.G.S. Datum.

(2) A plan review fee, based upon the following percentages of total land improvements costs, as estimated by the design engineer and approved by the City Engineer shall be submitted with the plans and specifications required above:

(a) One and one-half percent of the construction cost of the improvements when such cost is fifty thousand dollars or less.

(b) One percent of the construction cost of the improvements when such cost is over fifty thousand dollars but less than two hundred fifty thousand dollars.

(c) Three quarters of one percent of the construction cost of the improvements when such cost is over two hundred fifty thousand dollars. (Ord. 77-18, 10-19-77)

7-19-35. Acceptance of required land improvements by the city.

Upon the completion of the construction of all required public improvements, in conformance with City standards and the approved engineering plans and specifications, the design engineer engaged by the subdivider, builder or land developer shall prepare and submit three certified sets of as-built plans and verification by the City Engineer or Public Works Director that all public improvements have been satisfactorily completed in accordance with the approved engineering plans and specifications. The City Council will approve a resolution accepting the public improvements and the same shall not be accepted by the City as City-owned and maintained improvements until the approval of said resolution. The one-year warranty period described in Section 7-19-12, above, shall commence on the date the resolution is approved.
(Ord. 2004-02, 01-01-07-04); (Ord. 77-18, 10-19-77)

7-19-36. Repealed. (Ord. 2004-02, 01-07-04).
(Ord. 77-18, 10-19-77)

7-19-37. Building permits.

(1) No building permit shall be issued for the construction of any residential building, structure, or improvement to the land or any lot within a residential subdivision as defined herein, which has been approved for platting or replatting, until all requirements of this Chapter have been complied with. The Building Official may issue building permits for noncombustible residential construction when his/her justification is entered into the City address file, after the developer increases any required bonds for one (1) additional year, and after the finished street, curb and gutter, and all public utilities under the street are installed and have been approved by a qualified City Inspector. Notwithstanding Chapter 7-22 herein, under no circumstances shall a Certificate of Occupancy be issued until all requirements of this Chapter have been complied with.

(2) A building permit may be issued for noncombustible commercial construction prior to all requirements of this Chapter being completed after all of the following conditions are met:

(a) all public utilities required to be within the road right-of-way have been completed, compacted, tested, inspected, and certified; and,

(b) the complete width and depth of required road base has been installed, compacted, tested, inspected, and certified to grade, with all test results turned into the City Engineer or Community Development Director; and,

(c) all required bonding shall be extended for one (1) additional year; and

(d) the developer shall make available tire cleaning areas where the road is accessed; and,

(e) a road width of not less than 28 feet shall be maintained throughout the project until the finished road surface is in place.

(3) Prior to the finished surface being added to the road, a certified geotechnical report shall be obtained from a qualified engineer and turned in to the City Engineer or Community Development Director. The report shall stipulate that the minimum road base is in place, is compacted, is free of contamination, and will support the load for which it was designed.

(4) Notwithstanding Chapter 7-22, herein, under no circumstances will any Certificate of Occupancy be issued for any building, structure, or improvement until all requirements of this Chapter have been complied with.
(Ord. 2005-17, 06-15-2005); (Ord. 77-18, 10-19-77)

7-19-38. Repealed. (Ord. 2000-22, 10-18-2000).
(Ord. 77-18, 10-19-77)

7-19-39. Final plat execution, delivery, and recordation.

(1) The subdivider shall deliver to the City the fully executed final plat within ninety (90) days of final plat approval. Failure to fully execute the final plat, or to deliver the fully executed final plat to the City, within the specified ninety (90) days, shall result in the automatic revocation of, and shall void, the final plat approval.

(2) Tooele City shall record all final plats with the Tooele County Recorder.
(Ord. 2004-02, 01-07-2004); (Ord. 77-18, 10-19-77)

7-19-40. Repealed.
(Ord. 91-08, 12-12-91)

7-19-41. Repealed.
(Ord. 80-13, 04-10-80)

7-19-42. Repealed.
(Ord. 94-56, 01-31-95); (Ord. 88-18, 07-06-88)

7-19-43. Repealed.
(Ord. 94-56, 01-31-95); (Ord. 88-18, 07-06-88)

7-19-44. Exemptions from plat requirement.

(1) In subdivisions of less than ten lots, land may be sold by metes and bounds, without the necessity of recording a plat if:

(a) a recommendation has been received from the planning commission;

(b) the subdivision has been approved by the city council;

(c) the subdivision is not traversed by the mapped lines of a proposed street as shown in the general plan and does not require the dedication of any land for street or other public purposes; and

(d) if the subdivision is located in a zoned area, each lot in the subdivision meets the frontage, width, and area requirements of the zoning ordinance or has been granted a variance from those requirements by the board of adjustment.

7-19-45. Effect of revocation and voiding.

Any preliminary or final subdivision plat approval revoked or rendered void pursuant to the provisions of this Chapter 7-19 shall cause any new application of approval to be subject to the laws, ordinance, and policies of Tooele City current as of the date of the completed new application.
(Ord. 2004-02, 01-07-04)

NOTE: (This chapter renumbered from 7-19-13 thru 7-19-44 per Ordinance 97-13, 04-02-97)

AMENDED ORDINANCE 98-32

AN ORDINANCE OF TOOELE CITY AMENDING TOOELE CITY CODE 7-19-18 AND 4-8-2 REGARDING STREET DESIGN IN NEW SUBDIVISIONS

WHEREAS, the Tooele City Council passed Ordinance 98-25 regarding requiring the construction and improvement of full street widths within, adjacent to, and leading to all new subdivisions and developments; and,

WHEREAS, several developers objected to the severe burdens placed upon them by virtue of Ordinance 98-25, pleading the impossibility of compliance; and,

WHEREAS, the City Council requested that the City Attorney prepare an amendment accommodating those developers, which received subdivision approval prior to the passage of Ordinance of 98-25, and mitigating the burden of having to develop full street widths on streets leading to and adjacent to a subdivision where the developer does not own the property required for the full right-of-way and where the City does not yet know the location of future intersecting streets and the placement of public improvements; and,

WHEREAS, the proposed amended ordinance, listed below, provides for such accommodations;

NOW, THEREFORE, BE IT ORDAINED BY THE TOOELE CITY COUNCIL that Tooele City Code 7-19-18 is hereby amended to read in its entirety as follows, that Tooele City Code 4-8-2(12) is hereby repealed and replaced with Tooele City Code 4-8-2a to read in its entirety as follows:

7-19-18. Streets.

(1) General rule. The arrangement of streets in a new development shall provide for the continuation of existing streets in adjoining areas at the same or greater widths, unless altered by the Planning Commission upon recommendation of the Tooele City Public Works Director. Partial streets shall not be permitted within a development, adjacent to a development, leading to a development, or otherwise. All developments shall be adjacent to a dedicated street. All streets shall comply with the provisions of Title 4, Chapter 8, Tooele City Code, and the current Tooele City transportation master plan.

(2) Exceptions to the general rule. An exception to the general rule stated in this Section may be granted by the City Council, upon written request submitted to the City Recorder at least 15 days prior to the date upon which the City Council will consider the request, to the following:

(a) Those subdivisions which have received preliminary or final plat approval prior to September 16, 1998;

(b) Those developments which have received site plan approval prior to September 16, 1998.

(c) Those planned developments which have received City Council approval prior to September 16, 1998, and which set forth with specificity a development phasing schedule, a transportation development plan, and any other information required by the City, in a development agreement duly executed by the Mayor.

(d) Those non-residential developments consisting of a single building or group of buildings, the use of which will benefit the City while not unduly taxing City resources in providing City services, e.g., police protection, fire protection, snow ploughing, utilities maintenance. Benefits which may be considered by the City Council include, but are not limited to, the following:

(i) employment generated by the proposed development;

(ii) property and sales tax revenue generated by the proposed development;

(iii) water supply demanded by the proposed development; and/or

(iv) non-commercial and non-governmental services offered to be provided by the proposed development to Tooele City residents by not-for-profit organizations, e.g., churches, schools.

(3) The standards governing developments excepted from the general rule stated in this Section are as follows:

(a) Streets within a development. Partial streets shall not be permitted in areas of development not on the outer boundaries of the development.

(b) Streets adjacent to a development. The developer shall fully develop the side of the street fronting the development and shall construct an adequate travel surface and associated improvements as determined by the Planning Commission upon recommendation of the Public Works Director, whose recommendation shall be based in part upon

considerations of public health and safety.

(c) Streets leading to a development. For streets leading to a development, the developer shall construct an adequate travel surface and associated improvements as determined by the Planning Commission upon recommendation of the Public Works Director, whose recommendation shall be based in part upon considerations of public health and safety. Where, in the opinion of the Public Works Director, a travel surface and associated improvements become inadequate to protect the public health and safety because of a proposed new development, the developer of that proposed new development shall improve the travel surface so that it becomes an adequate travel surface in the opinion of the Planning Commission upon recommendation of the Public Works Director.

(4) Street standards and specifications. Except as permitted by this Section, developers shall adhere to the provisions of Title 4, Chapter 8, Tooele City Code, and the current Tooele City transportation master plan.

4-8-2a. Street widths.

Street widths shall conform to the provisions of Section 7-19-18 of this Code. Street design and construction standards and specifications shall conform to the provisions of this Title.

PROXY VOTE of EARL COLE
City Councilman
City Council Meeting
September 2, 1998

Ordinance 98-32: An Ordinance of Tooele City Amending Tooele City Code 7-19-18- and 4-8-2 Regarding Street Design in New Subdivisions.

Vote: Nay

Resolution 98-50: A Resolution Creating the Tooele City, Utah, Vine Street Special Improvement District and Authorizing the City Officials to Proceed to Construct Improvements Within the District.

Vote: Nay, to the District as proposed, OR
Yay, to a modified District giving consideration to lawful protests

Earl Cole
Signed: Earl Cole

Notary

State of Utah)
: ss
County of Tooele)

Subscribed and Sworn to this 1st day of September, 1998.

Toni L Mendonca

NOTARY PUBLIC
TONI L. MENDONCA
90 NORTH MAIN
Tooele, UT 84074
My Commission Expires June 14, 2000
State of Utah

TC037472

This Ordinance is necessary for the immediate preservation of the peace, health, and safety of Tooele City residents and shall take effect immediately upon passage.

IN WITNESS WHEREOF, this Ordinance is passed by the Tooele City Council this 7 day of October, 1998.

TOOELE CITY COUNCIL

(For)	(Against)
Earl Cole	
Lawrence F. Silcox	
John Kimpf	
Charles H. Brooks	
Colleen Johnson	

ABSTAINING: _____

MAYOR OF TOOELE CITY

(Approved)	(Disapproved)
Charlie Baker	

ATTEST:

Patrick H. Dunlavy, City Recorder

SEAL

Approved as to Form: Roger Evans Baker, Tooele City Attorney

C:\Documents\ORD\Street widths.832 amended.wpd

ORDINANCE 94-56

AN ORDINANCE OF THE TOOELE CITY COUNCIL RELATING TO THE BOARD OF ADJUSTMENT; REPEALING CONFLICTING PROVISIONS IN THE TOOELE CITY CODE RELATING TO THE BOARD'S POWERS AND DUTIES; REPEALING REFERENCES TO THE BOARD OF ADJUSTMENT IN THE SUBDIVISION ORDINANCE; ENACTING A REFERENCE IN THE ZONING ORDINANCE PERTAINING TO THE FUNCTIONS OF THE BOARD OF ADJUSTMENT AND HOW TO MAKE APPLICATION THERETO; AND MAKING TECHNICAL CORRECTIONS

PREAMBLE

WHEREAS, a review of provisions in the Tooele City Code pertaining to the board of adjustment has discovered conflicting law, provisions that are contrary to state law, the need for a reference in the zoning ordinance of how to make application to the board of adjustment, and technical corrections that should be made; and,

WHEREAS, the establishment of the board of adjustment, its powers and duties are correctly specified in Tooele City Code Title 2 Chapter 4; and,

WHEREAS, because this ordinance contemplates an amendment to the subdivision ordinance, the planning commission reviewed it at a public hearing on Dec. 14, 1994, following 14-days published notice of the hearing pursuant to Utah Code Ann. §10-9-802, whereupon the commission voted to recommend its approval to the city council; and,

WHEREAS, because this ordinance also contemplates an amendment to the zoning ordinance, this council published in the Tooele Transcript-Bulletin 14-days notice of the time, place, and purpose at which the zoning and subdivision amendments were to be considered and public comment heard, and thereafter held that public hearing on December 21, 1994; and,

WHEREAS, this Council finds this ordinance to be in the best interest, the peace and the welfare of Tooele City and the citizens thereof, and that it should adopted;

Tooele City Council Ordinance 94-56.

ORDAINING CLAUSE

NOW, THEREFORE, BE IT ORDAINED BY THE TOOELE CITY COUNCIL THAT:

Section 1. Section Amended.
Section 1-6-6, Tooele City Code, Officers, Tooele City Code, as enacted by Ordinance 67-3, is amended to read:

1-6-6. Officers.
The ~~M~~mayor shall appoint the following officers: ~~T~~treasurer, ~~P~~public ~~S~~safety ~~D~~director, ~~Clerk of the Court,~~ ~~P~~poundkeeper, five ~~(5)~~ members of the ~~P~~planning ~~C~~commission, and all advisory boards, ~~excepting t~~The following officers ~~who~~ shall be appointed by the city ~~C~~council: ~~R~~recorder, ~~A~~auditor, ~~A~~annual ~~I~~independent ~~A~~auditor, two ~~(2)~~ members of the ~~P~~planning ~~C~~commission, and members of the ~~B~~board of ~~A~~adjustment. The ~~M~~mayor, by and with the consent of the ~~C~~council, shall appoint the ~~A~~attorney.

Section 2. Section Amended.
Section 4-8-2, Street design, Tooele City Code, as enacted by Ordinance 91-04, is amended to read:

4-8-2. Street design.
(1) All streets shall be subject to topographical conditions, public convenience and safety, and the relation to the proposed uses of land to be served by such streets. Where such is not shown on the land use plan or other plat of the City, the arrangement of streets in a subdivision and elsewhere shall either:

(a) provide for the continuation or appropriate projection of existing principal streets in surrounding areas; or

(b) conform to a plan for the area or neighborhood approved or adopted by the planning commission to meet a particular situation where topographical and other conditions make continuance or conformance to existing streets impracticable.

(2) Streets shall be laid out so as to intersect as nearly as possible at right angles and no street shall intersect any other street at less than 60 degrees.

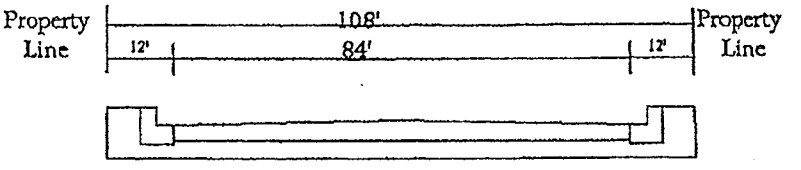
(~~2~~3) The following functional classifications, definitions, and cross sections shall apply to all streets, alleys, curbs, and gutters within Tooele City:

(a) (i) Functional Classification -- Urban principal arterial system.

(ii) Definition -- Streets and highways servicing major metropolitan activity centers and separate communities, the highest traffic volume corridors, the longest trip desires, and a high proportion of total urban area travel on a minimum of ~~milage~~ mileage. Service to abutting land shall be subject to controlled access. This system carries the major portion of trips entering and leaving an urban area, as well as

the majority of through movements desiring to bypass the central portion of Tooele City, and normally will carry important intra-urban as well as inter-city bus routes.

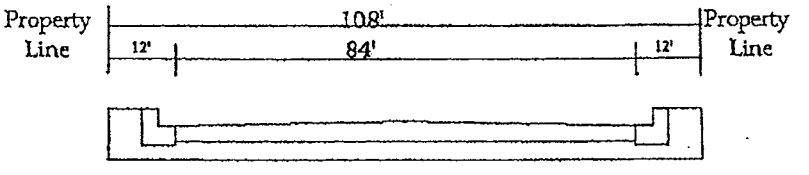
(iii) Cross section --



(b) (i) Functional Classification -- Urban minor arterial street system.

(ii) Definition: Streets and highways interconnecting with and augmenting the urban principal arterial system and providing service to trips of moderate length at a somewhat lower level of travel mobility. The system places more emphasis on land access and distributes travel to geographic areas smaller than those identified with the higher systems. It includes all arterials not classified as principal. There may or may not be controlled access.

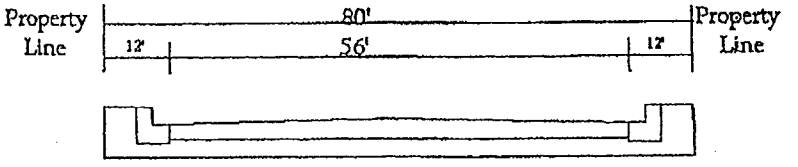
(iii) Cross Section --



(i) Classification -- Urban collector street system.

(ii) Definition -- Streets penetrating neighborhoods, collecting traffic from local streets in the neighborhoods, and channeling it into the arterial systems. A minor amount of through traffic may be carried on collector streets, but the system primarily provides land access service and carries local traffic movements within residential neighborhoods, commercial, and industrial areas. It may also serve local bus routes.

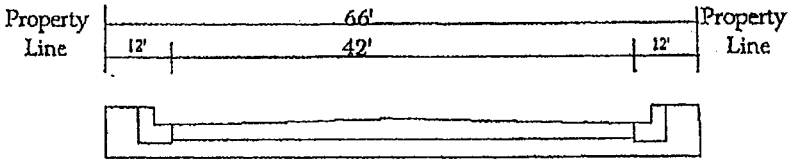
(iii) Cross Section -



(d) (i) Classification -- Urban local street system.

(ii) Definition -- Streets not classified in a higher system, primarily providing direct access to abutting land and access to the higher system. They offer the lowest level of mobility and usually carry no bus routes; service to through traffic is deliberately discouraged.

(iii) Cross section --



(e) (i) Classification -- Alleys.

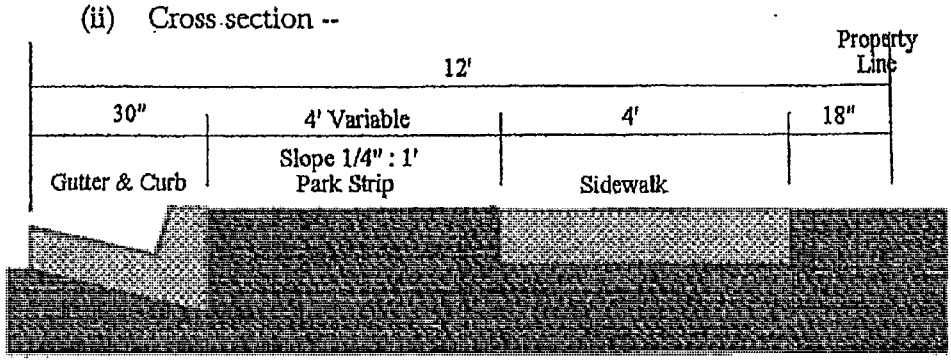
(ii) Definition -- Minor ways which are used primarily for the vehicular access to the back or the side of properties otherwise abutting on a street.

(iii) Cross section -- The cross section of alleys must be determined by the city on a case by case basis. The hard surface travel way of an alley shall in no case be less than ~~thirty~~ 30 feet in width.

(f) (i) Curb and gutter descriptions. All curbs shall be six inches high from the lowest point of the gutter and four inches high from the flag of the gutter. The curb and gutter shall be poured at one time with six bag cement. Behind the curb shall be a park strip, the width of which will vary according to the width of the dedicated street right-of-way. The park strip may be eliminated by the city council for good cause shown after consideration of recommendations of the city engineer. There shall be a minimum four-foot wide sidewalk with an additional one and one-half foot wide strip of property prior to the property line of the adjacent premises. The sidewalk shall be widened to five feet for a distance of five feet at least every ~~two hundred~~ 200 feet. All sidewalks in commercial districts and in areas of general public gathering such as at parks and in front of churches and schools, shall be a minimum of five feet wide, with an appropriate decrease in park strip width.

Tooele City Council Ordinance 94-56.

(ii) Cross section --



(g) Variances may be granted by the board of adjustment from the requirements of Subsection (2) in appropriate situations where found to be beneficial and in order to promote the health, safety, welfare, and efficient and orderly development of Tooele City. ~~The procedure for obtaining a variance is provided in Tooele City Code 7-19-42.~~

(~~3~~4) Dead end streets, if any, shall ordinarily be not more than 200 feet in length, with a minimum outside radius of 50 feet at the closed end, unless the street ends at a point where the subdivider or developer intends to extend a street pursuant to his preliminary plan submitted and approved by the City, in which case the turn-around may be of a temporary nature.

(~~4~~5) No more than two cross streets shall intersect at any one intersection.

(~~5~~6) Street grades shall be more than five-tenths percent, but less than ten percent for local and minor streets and alleys and less than seven for secondary and major streets.

(~~6~~7) Streets shall be leveled, whenever possible, to a grade of less than four percent for a distance of at least 100 feet approaching all intersections, and at the intersection a grade of three percent shall be maximum.

(~~7~~8) All crests and sags shall have a vertical curve of a minimum length pursuant to the following table:

Design Speed, MPH	20	30	40	50	60
Stopping Sight Distance:					
Stopping distance, feet	150	200	275	350	475
K* value for:					
Crest vertical curve	16	28	55	85	160
Sag vertical curve	24	35	55	75	105
Passing Sight Distance:					
Passing distance, feet					
2-lane		1,100	1,500	1,800	2,100
K* value for:					
Crest vertical curve		365	686	985	1,340

*K value is a coefficient by which the algebraic difference in grade may be multiplied to determine the length in feet of the vertical curve which will provide minimum sight distance.

(~~8~~9) Minimum radii of curvature on the center line shall be:

(a) 300 feet for major streets;

(b) 200 feet for secondary streets;

(c) 100 feet for local streets.

(~~9~~10) Between reversed curves there shall be a tangent at least 100 feet long.

(~~10~~11) Street, alley, and pavement intersections shall be rounded by an arc, the minimum radius of which shall be:

(a) 20 feet for streets;

(b) ~~5~~ five feet for ~~streets and~~ alleys;

(c) 20 feet or the shortest distance from pavement to the nearest property line for street pavements.

(~~11~~12) Wherever a dedicated or platted half-street or street only one-half wide as is required to serve the area to be subdivided or developed, within a subdivision or contiguous thereto, exists, the subdivider or developer shall be responsible for the improvement of the entire street so as to meet the then existing standards for street design, for the distance said street is contiguous to the subdivision tract. No new half-streets shall be permitted. If peripheral streets must be created, the subdivider or developer shall be responsible for the entire width.

Section 3. Section Amended.

Section 7-4-5, Parking lots, Tooele City Code, as last amended by Ordinance 84-16, is amended to read:

7-4-5. Parking lots.

Every parcel of land used as a public or private parking lot shall be developed and maintained in accordance with the following requirements:

(1) ~~Surfacing.~~ Each off street parking lot shall be surfaced with a bituminous surface course, Portland cement concrete or other approved surface ~~as~~ to provide a dustless surface. The ~~P~~planning ~~C~~commission must approve any surface that is not bituminous surface course or Portland cement concrete.

(2) ~~Screening.~~ The sides and rear of any off-street parking lot which face or adjoin a residential district shall be adequately screened from such district by a masonry wall or solid visual barrier fence not less than three ~~(3)~~ or more than six ~~(6)~~ feet in height as measured from the high side.

(3) ~~Landscaping.~~ Each parking lot shall be ~~adequately~~ landscaped and permanently maintained.

(4) ~~Lighting.~~ Lighting used to illuminate any parking lot shall be arranged to reflect the light away from adjoining premises and from street traffic.

(5) ~~Conditional use permit.~~ Where not otherwise authorized by this Title, when in the best interests of the community as determined by the ~~P~~planning ~~C~~commission, ~~said~~ the ~~C~~commission may grant temporary or permanent conditional use permits for the use of land in residential districts for a parking lot, provided that in all cases~~,~~ the following conditions are met:

(a) The lot is to be used only for parking ~~or~~ of passenger automobiles of employees, customers, or guests of the person or firm controlling and operating the lot, who shall be responsible for its maintenance and upkeep.

(b) No charges shall be made for parking on ~~said~~ the lot.

(c) The lot ~~is not~~ shall not be used for sales, repair work, or servicing of any kind, but shall be used for parking of vehicles only.

(d) Entrances to and exits from the lot ~~are to~~ shall be located so as to do the least harm to the residential district in an aesthetic context.

(e) No advertising sign ~~or material is to~~ shall be located on the lot.

(f) All parking is to be kept back of the setback building lines by a barrier which will prevent the use of the premises in front of the setback lines for the parking of automobiles~~, unless otherwise specifically authorized by the Board of Adjustment~~.

(g) The parking lot and that portion of the driveway back of the building line is to be adequately screened from the street and from adjoining property in a residential district by a hedge or sightly fence or wall not less than three ~~(3)~~ feet, nor more than six ~~(6)~~ feet in height, located back of the setback building line~~;~~. ~~all~~ All lighting is to be arranged so there will be no glare therefrom annoying to the occupants of adjoining property in a residential district. ~~and the~~ The surface of the parking lot is to be smoothly

graded, hard-surfaced~~,~~ and adequately drained.

(h) There may be imposed such other conditions as may be deemed necessary by the ~~P~~planning ~~C~~commission to protect the character of the residential district.

(i) Drainage shall be disposed of upon the premises of the parking lot, as per the requirement set by the ~~Tooele City Engineer~~ city engineer.

(j) No private or public garage or parking lot for more than five ~~(5)~~ motor vehicles shall have an entrance or exit in any district within ~~one hundred fifty~~ (150) feet of the entrance or exit of a public school, church, playground, or other public or semi-public institution or facility.

Section 4. Section Amended.

Section 7-5-12, Lapsing of permit, Tooele City Code, as enacted by Ordinance 88-18, is amended to read:

7-5-12. Lapsing of permit.

Where building or remodeling requiring a building permit is contemplated in connection with the use, the conditional use permit shall lapse 180 days after its issuance unless prior to that date a building permit has been issued and construction is commenced and diligently pursued, or unless otherwise specifically provided by the ~~P~~planning ~~C~~commission. A request for renewal must be accompanied by a written statement, under oath, by the applicant or ~~his~~ an authorized agent, stating the reason the building permit has not been issued ~~and/~~or why no construction has been commenced. A conditional use permit may be renewed by the ~~P~~planning ~~C~~commission for a period of 90 days. ~~If renewal of the conditional use permit is denied by the Planning Commission, an appeal may be taken to the Board of Adjustment within 30 days of such denial. The appeal shall be heard at the next available regular meeting of the Board of Adjustment. The Board of Adjustment shall render a decision on the denial of this renewal request within 30 days of the hearing. However, if no decision by the Board of Adjustment is made within such period, the request for renewal shall be deemed denied. In all other cases where the use requested is not maintained for any six month period, the permit shall lapse unless otherwise provided for by the Planning Commission, or unless a renewal is obtained as provided above.~~

Section 5. Section Amended.

Section 7-6-7, Scope of planning commission actions, Tooele City Code, as enacted by Ordinance 88-18, is amended to read:

7-6-7. Scope of planning commission action.

In carrying out the intent of this Chapter, the ~~P~~planning ~~C~~commission shall consider the following principles:

(1) It is the intent of this Chapter that site and building plans for a planned unit development shall be prepared by a professional architect or engineer having professional competence in urban planning as proposed in the application.

(2) It is not the intent of this Chapter that control of the design of a planned unit development by the ~~P~~planning ~~C~~commission be so rigidly exercised that individual initiative be stifled and substantial additional expense incurred; rather, it is the intent of this Chapter that the control exercised be the minimum necessary to achieve the purpose of this Chapter.

(3) The ~~P~~planning ~~C~~commission may approve or disapprove an application for a planned unit development. In an approval, the ~~C~~commission may attach such conditions as it may deem necessary to secure compliance with the purposes set forth ~~herein.~~ in this Chapter. ~~The decision of the Planning Commission may be appealed to the Board of Adjustment.~~

Section 6. Section Amended.

Section 7-9-4, Application, Tooele City Code, as last amended by Ordinance 88-18, is amended to read:

7-9-4. ~~Application.~~ Recreational vehicle park development application.

(1) An overall plan for development of a recreational vehicle park shall be submitted to the ~~P~~planning ~~C~~commission for review. The plan shall be drawn to a scale not smaller than one ~~(1)~~ inch to ~~fifty (~~50~~)~~ feet. At least six ~~(6)~~ copies of the plan shall be submitted. The plan shall show:

(a) ~~T~~the topography of the ~~side~~ site, when required by the ~~P~~planning ~~C~~commission, represented by contours shown at not greater than two foot intervals~~.~~;

(b) ~~T~~the proposed street and ~~trailer or~~ recreational vehicle space pad layout~~.~~ , with c~~C~~onvenient means of vehicular and pedestrian access to recreational vehicles, parking areas and accessory buildings, including access for firefighting equipment, delivery trucks, and garbage trucks, as well as occupant's automobiles; ~~All roads shall be continuous.~~

(c) ~~T~~tabulations showing the percent of area to be devoted to parks, playgrounds and open space, the number of trailer spaces and total area to be developed~~.~~;

(d) ~~P~~proposed location, number, and design of parking spaces and accessory buildings~~.~~;

(e) a ~~G~~generalized landscaping and utility plan, including location of water, sewer, electricity, gas lines, and fire hydrants~~.~~;

(f) ~~A~~any other data the ~~C~~city ~~E~~engineer or ~~P~~planning ~~C~~commission may require.

(2) Applications for approval shall be in writing, submitted to the ~~P~~planning ~~C~~commission. ~~at its regular meeting and shall be granted or denied within 30 days, unless an extension of time is approved by the Planning Commission. An application~~

~~denied by the Planning Commission may be appealed to the Board of Adjustment, which appeal must be made in writing within 30 days after such denial.~~

(3) ~~City Engineer.~~ It shall be the duty of the ~~C~~city ~~E~~engineer to investigate and examine all such premises to determine that licenses or keepers thereof have complied with the provisions of this Code.

(4) ~~Register Required.~~ Every licensee of such premises shall keep a daily register of all guests or tenants of such premises. ~~said~~The register shall be available at all times and for one ~~(1)~~ year thereafter for inspection by Tooele City.

(5) ~~Fee; Issuance.~~ After the installation of all required improvements and service facilities in accordance with specifications as indicated by a statement from the ~~C~~city ~~E~~engineer, and upon the payment of a fee as per an adopted schedule, which fee shall be effective for the balance of the calendar year in which it is issued, the ~~C~~city ~~R~~recorder shall issue a license to operate a recreational vehicle park ~~or campground~~.

(6) ~~Revocation.~~ Upon the recommendation of the ~~C~~city ~~E~~engineer, and after a hearing and due cause shown at such hearing, the ~~C~~city ~~C~~council may refuse to grant any license under this Chapter and may revoke any license theretofore issued~~, and~~. ~~i~~It shall be unlawful for any person to operate any recreational vehicle park after the revocation of ~~his~~ the license; provided, that all applicants or licensees shall be given a reasonable notice of any hearing as specified in this Chapter.

(7) ~~Rules and Regulations.~~ The City is hereby authorized to make and to adopt such written regulations as may be necessary for the proper enforcement of the provisions of this Chapter provided, that such regulations shall not be in conflict with the provisions of this Chapter, and the penalty for violation of the provisions thereof shall be the same as the penalty for violation of any provisions of the Code.

(8) ~~Display.~~ The license to conduct or maintain a recreational vehicle park ~~issued pursuant to the provisions of this Chapter~~ shall be ~~properly framed~~ and conspicuously displayed in the recreational park office located upon the premises.

(9) ~~Dimensions and Specifications.~~ The dimensions and improvement specifications of recreational vehicle parks shall be as follows:

(a) ~~Area.~~ Each recreational vehicle space shall be not less than ~~one thousand two hundred fifty~~ ~~(~~1,250~~)~~ square feet in area and shall be at least ~~twenty five~~ (25) feet wide. All spaces shall be clearly marked and shall be accessible from all sides. Only one ~~(1)~~ recreational vehicle shall be parked in one ~~(1)~~ recreation vehicle space.

(b) ~~Spacing of recreational vehicles.~~ The minimum spacing between recreational vehicles and between recreational vehicles and buildings shall be as follows:

(i) ~~S~~side-to-side spacing, ~~fifteen (~~15~~)~~ feet;

(ii) ~~E~~end-to-end spacing, ten ~~(10)~~ feet~~;~~.

(c) ~~(iii)~~ No recreational vehicle shall be located closer than ~~twenty five (~~25~~)~~ feet from the right-of-way line of a street or highway nor closer than ten ~~(10)~~ feet from the recreational vehicle park boundary.

(~~e~~d) ~~Interior roads.~~ All roads within the recreational vehicle park shall be at least ~~twenty (~~20~~)~~ feet wide, exclusive of parking space~~.~~, and shall be continuous.

(~~d~~e) ~~Parking space.~~ Each recreational vehicle space shall be provided with parking space of not less than ~~two hundred (~~200~~)~~ square feet for at least one ~~(1)~~ vehicle, exclusive of roadways.

(~~e~~f) ~~Walks.~~ Walks of not less than three ~~(3)~~ feet in width shall be provided from the entrance~~,~~ exclusive of roadways.

(~~f~~g) ~~Service buildings.~~ In any recreational vehicle park designed for, or licensed to permit, one ~~(1)~~ or more dependent recreational vehicles, service buildings shall be provided within ~~two hundred (~~200~~)~~ feet from any such recreational vehicle space as follows:

(i) There shall be ~~S~~separate men's and women's toilet rooms, distinctly marked and separated by a sound-resistant wall. A vestibule or screen shall be provided to prevent direct view into toilet rooms when exterior doors are open.

(ii) For each ten ~~(10)~~ dependent recreational vehicles or~~,~~ fraction thereof, there shall be:

(a) ~~O~~one laundry tray or washing machine~~.~~;

(b) ~~F~~for men, one water closet, but urinals may be substituted for one-third ~~(1/3)~~ of the number of required water closets; one lavatory or wash basin; one bathtub or shower; one ~~slot~~ sink with hot and cold running water~~.~~;

(c) ~~F~~for women, one water closet; one lavatory or wash basin; one bathtub or shower; one ~~slop~~ sink with hot and cold running water~~.~~;

(iii) All water closets and bathtubs for women and water closets and bathtubs for men shall be located in separate compartments. Gangtype shower compartments may be used for men. The room containing the laundry units shall be separated from the toilet rooms and have an exterior entrance only.

(~~iii~~iv) Heating facilities capable of maintaining a temperature in the service buildings of ~~seventy (~~70~~)~~ degrees Fahrenheit in cold weather shall be provided.

(~~g~~h) ~~Hot water.~~ Hot water facilities capable of maintaining a continuous supply of two ~~(2)~~ to three ~~(3)~~ gallons of ~~one hundred eighty (~~180~~)~~ degrees hot water per trailer shall be provided.

(~~h~~i) ~~Laundry Facilities.~~ Mechanical laundry drying equipment or laundry drying yards of at least ~~fifty (~~50~~)~~ square feet per recreational vehicle space shall be provided.

(~~i~~j) ~~Refuse containers.~~ Fly-tight and rodent-tight containers of not less than ~~twenty (~~20~~)~~ gallons capacity shall be provided and maintained for each recreational vehicle space.

(10) ~~Utilities.~~ Utilities, including culinary water, sewage electricity, shall be available to each recreational vehicle space.

Section 7. Section Amended.

Section 7-11-6, Approval, Tooele City Code, as enacted by Ordinance 88-18, is amended to read:

7-11-6. Approval.

The ~~P~~planning ~~C~~commission, or the ~~E~~engineering ~~D~~department when authorized by the ~~P~~planning ~~C~~commission, shall determine whether the proposed architectural and site development plans submitted are consistent with this Chapter and with the general objectives of this Title, and shall give or withhold approval accordingly. ~~Denial or approval by the Engineering Department may be appealed to the Planning Commission, and denial or approval by the Planning Commission may be appealed to the Board of Adjustment.~~

Section 8. Section Amended.

Section 7-20-13, Tenant protest review, Tooele City Code, as enacted by Ordinance 88-18, is amended to read:

7-20-13. Tenant protest review.

(1) When a tenant of a residential dwelling has received written formal notice of eviction without cause and without at least 60 days notice of conversion and has reason to believe that notice was issued because of a proposed condominium project, the tenant may, within ~~30~~ 15 days of the date of the notice of eviction, initiate an appeal regarding the issue of proper notice to the ~~B~~board of ~~A~~adjustment on a form provided in the office of the ~~B~~building ~~O~~official. The filing of such a protest shall stay the issuance of any approval or issuance of any permits for the structure in question for a period~~s of~~ not to exceed 30 days and the matter shall be set for hearing before the ~~B~~board of ~~A~~adjustment. Subsequent appeals shall not act to further stay the issuance of approval of the condominium project.

(2) Upon filing, a copy of the appeal form shall be forwarded to the Tooele Housing Authority for relocation advice and assistance. That Authority shall within ten days forward to the ~~B~~board of ~~A~~adjustment a statement of its report and recommendation.

(3) Upon filing of an appeal, the ~~B~~building ~~O~~official shall institute an investigation to determine if the notice requirements ~~set forth above~~ were satisfied. ~~He~~ The building official shall then report his findings to the ~~B~~board of ~~A~~adjustment within ten days of filing the appeal.

(4) The ~~B~~board of ~~A~~adjustment shall fix a reasonable time for the hearing of the appeal, give due notice to the appellant and to the owner/developer of the condominium project, and shall, at the hearing, review the appeal together with Agency and department reports, recommendations and related permit or subdivision applications and shall decide the same within 30 days from the date of filing of the appeal.

(5) The ~~B~~board of ~~A~~adjustment, with regard to ~~the~~ hearing ~~of~~ the appeal, may:

(a) ~~E~~enforce the attendance of witnesses, the production of books and papers and administer oaths;

(b) ~~D~~direct municipal resources, if necessary and appropriate, to alleviate relocation hardships;

(c) ~~H~~hear and decide allegations of error in any order, requirement, decision or determination made by a municipal officer in the performance of ~~his~~ the officer's duties;

(d) ~~S~~see that the laws and ordinances are faithfully executed and direct investigations accordingly;

(e) ~~I~~institute any appropriate actions or proceedings to prevent or punish persons from or for performing any acts contrary to the building and zoning ordinances of Tooele City;

(f) ~~I~~impose reasonable conditions relating to the terms and conditions upon which the project will be approved, which may include suspension of approval pending preparation and implementation of a reasonable relocation plan or services for tenants who have not been given proper notice, or denial of the application in which event the owner/developer may not re-apply for 18 months from the date of denial.

Section 9. Section Enacted.

Section 7-1-9, Appeals, special exceptions and variances, Tooele City Code, is enacted to read:

7-1-9. Appeals, special exceptions and variances.

(1) The board of adjustment shall hear and decide:

(a) appeals from zoning decisions applying the zoning ordinance;

(b) special exceptions to the terms of the zoning ordinance; and

(c) variances from the terms of the zoning ordinance.

(2) A person desiring to appeal a zoning decision, apply for a special exception from the zoning ordinance where authorized, or apply for a variance from the zoning ordinance shall file the appropriate application obtained from the Tooele City engineering department, with the Tooele City building official. Any applicable fee shall be paid to the Tooele City finance department at the time of filing. The building official shall review the application for completeness and fee payment and forward it to the city recorder who shall set a hearing with the board of adjustment. The city recorder shall notify the applicant of the date and time of the hearing.

(3) The powers and duties of the board of adjustment and the standards of review it must follow in deciding appeals, special exceptions and variances are identified in Tooele City Code Title 2 Chapter 4.

Section 10. Repealer.

Section 7-5-8, Variances from design and improvement standards, Tooele City Code, as enacted by Ordinance 83-05;

Section 7-5-10, Appeal, Tooele City Code, as enacted by Ordinance 88-18;

Section 7-5-11, Effective date, Tooele City Code, as enacted by Ordinance 88-18;

Section 7-19-41, Appeal, Tooele City Code, as enacted by Ordinance 88-18;

Tooele City Council Ordinance 94-56.

Section 7-19-42, Adjustment, Tooele City Code, as enacted by Ordinance 88-18; and Section 8-1-20, Review, Tooele City Code, as enacted by Ordinance 75-17, are repealed.

EFFECTIVE DATE

This Ordinance is necessary for the immediate preservation of the welfare of the City and shall become effective on the date of publication.

IN WITNESS WHEREOF, this Ordinance is passed by the Tooele City Council this 21 day of December 1994.

TOOELE CITY COUNCIL

(AGAINST)	(FOR)
_____	John David Faddis
_____	John K Lebaugh
_____	Colleen S. DeLaMare
_____	Karen A. Aldridge
_____	Ronald Peterson

ABSTAINING: _____

MAYOR OF TOOELE CITY

(AGAINST)	(FOR)
_____	

Instruction No. 45: Procedures for Final Subdivision Plat Approval.

Before a real estate developer, such as Tooele Associates, may sell subdivided lots to home builders or other purchasers, the developer must get approval from Tooele City to subdivide its property into lots through a final subdivision plat. Tooele City ordinances are among the sources of requirements for a final subdivision plat. In this case, the Development Agreement and Bond Agreements also provide requirements. Tooele City ordinances obligate real estate developers to satisfy the following requirements to obtain City approval of a final subdivision plat:

1. The developer shall participate in a pre-application or pre-development conference with Tooele City representatives to review the proposed land development activity land uses, the configuration of the site, potential conformity or conflict with the City's development policy, and the process by which the developer may proceed to such subdivision plat approval.

2. The developer will then cause to be prepared the preliminary subdivision plan, which shall include all of the property to be subdivided by the developer as well as all other property owned or controlled by the developer that is adjacent to the portion to be subdivided. The preliminary subdivision plan must be accompanied by, among other things, a preliminary plan for sewer and waterlines and other public improvements, a letter from each utility company involved in the subdivision addressed to the Planning Commission stating that the preliminary subdivision plan has been reviewed and setting forth the utility company's comments regarding the utility service design and easements, a copy of a preliminary report of a title insurance company, and a title insurance policy or an attorney's opinion brought to date of the application setting forth the names of all property owners of property included in the proposed subdivision, as well as all mortgages, judgments, liens, easements, contracts and other clouds affecting title to said premises. The developer shall also prepare such other supplementary material as was specified by the City in the pre-application process, as well as a written application for approval of the preliminary plan.

3. Thereafter, copies of the preliminary plan shall be distributed to City officials for their review and comment.

4. The City officials' review and comment shall be presented during a meeting of the Tooele City Planning Commission. Also during that meeting, the developer and the Planning Commission shall review the

preliminary plan for compliance with City ordinances or other applicable requirements, such as those in bond agreements or a development agreement. The Planning Commission shall recommend approval or disapproval of the preliminary subdivision plan and submits its and the City Engineer's recommendations to the City Council.

5. The City Council shall then consider the preliminary subdivision plan and render the final decision of the City approving or disapproving the plan.

6. If the City Council approves the preliminary subdivision plan, within one year of such approval, the developer must submit a proposed final plat, which shall conform substantially to the preliminary plan, as approved.

7. The developer's submission of the final plat application must be accompanied by all engineering drawings for review by the City Engineer. During a Planning Commission Meeting, the Planning Commission will review the proposed final plat during a meeting and adopt a positive or negative recommendation to the City Council.

8. Thereafter, the City Council shall consider the proposed final plat during a City Council Meeting and either approve or disapprove the proposed final plat. If approved by the City Council, the final plat will be recorded with the Tooele County Recorder.

Instruction No. 46: Procedures for Accepting Public Improvements.

Before Tooele City can accept public improvements, Tooele Associates must satisfy the following procedures:

1. Tooele Associates must provide four complete sets of engineering plans and specifications or required land improvements to the Tooele City Building Official. The plans and specification must bear the seal of a Utah registered professional engineer along with a signed statement to the effect that the plans and specifications comply with the Tooele City Code and with good engineering practices. The plans must show profiles of all utility and street improvements.

2. Execute a Bond Agreement to ensure the completion of all public improvements required to be installed in the subdivision and provide a Bond to secure the obligations contained in the Bond Agreement.

3. The final plat must be approved by the Tooele City Council, after a recommendation from the Tooele City Planning Commission.

4. Construction of all required public improvements must be completed in conformance with Tooele City standards and the approved engineering plans and specifications.

5. The design engineer engaged by Tooele Associates must then prepare and submit three certified sets of as-built plans reflecting the public improvements actually built/installed.

6. The Tooele City Engineer or Public Works Director must verify that all public improvements have been satisfactorily completed in accordance with the approved engineering plans and specifications.

7. The Tooele City Council will then approve a resolution accepting the public improvements.

After acceptance by the City Council, a one-year warranty period commences before the end of which any defects or damage must be corrected.

Instruction No. 47: Tooele City Code Regarding Installation on Both Sides of Street.

Tooele City Code § 4-8-2(12) does not impose the duty to install gutters, curbs, and sidewalks on both sides of the streets as soon as each road is laid, nor does it specifically permit Tooele City to withhold permits as a result of any delay in completing the roads. It may reasonably be interpreted to allow a developer to fulfill its duty within a reasonable time.

Instruction No. 48: Tooele City Code Regarding Incomplete Improvements in Prior Subdivisions.

Tooele City Code § 7-19-16 "phase development" does not vest Tooele City with discretion to deny the creation of further subdivisions on the basis of incomplete improvements in prior subdivisions nor does it apply to Master Community Development Agreements, such as the one in this case.

Tooele City Code § 7-19-37 likewise does not vest Tooele City with discretion to deny the creation of further subdivisions on the basis of incomplete improvements in prior subdivisions.

Jury Instruction No. 41: Types of Business Entities

This case involves different types of business entities. Tooele Associates is a limited partnership or "LP." A limited partnership is a legal entity made up of general and limited partners. Tooele Associates' limited partners are not personally liable for Tooele Associates' obligations, while Tooele Associates' general partners are generally personally liable for Tooele Associates' obligations.

Perry/Tooele Associates is a limited liability company or "LLC." A limited liability company is a legal entity distinct from its members. Among other things, this means that no organizer, member, manager, or employee of Perry/Tooele Associates is personally liable under a judgment, decree, or court order for a debt, obligation, or liability of Perry/Tooele Associates or for the acts or omissions of Perry/Tooele Associates.

Instruction No. 50 : Inconsistent Statements.

You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.

Instruction No. 51: Effect of Willfully False Testimony.

If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.

Jury Instruction No. 52

Authority of City Attorneys

Absent limitations, a city attorney may bind a municipality to the same extent that any attorney may bind a client.

Jury Instruction No. 53

OVERLAKE PLATS ARE SUBDIVISIONS

A subdivision is a parcel of land in a larger development. Each plat of the Overlake development is a subdivision.

Jury Instruction No. 54

Waiver

A "waiver" is the intentional relinquishment of a known right, benefit or advantage. To decide whether a party has waived a contract right, benefit or advantage you must determine that all the following have been proved:

- a party has a contract right, benefit or advantage;
- the party knew of the right, benefit or advantage; and,
- the party intended to release that right, benefit or advantage.

The intent to release a right, benefit or advantage may be express or implied and may be determined by considering all relevant circumstances.

Tooele Associates contends that acts, statements or admissions of the Tooele City and/or its officials and employees constituted a waiver of the City's known rights, benefits or advantages relating to Tooele Associates' completion of the public improvements in Overlake under the Development Agreement. The City denies that it waived such rights, benefits or advantages.

Instruction No. 56: Closing Arguments.

In a moment you will hear the lawyers give their closing arguments. Remember that the lawyers trying this case are not on trial. Any feelings you may have about them should not influence your decision in this case. They are advocates doing their best to represent their clients' interests as they explain their view of the case. If in their closing arguments the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

Instruction No. 56 : Selection of Foreperson and Return of Verdict.

This case is not submitted to you for the rendition of a general verdict as is sometimes done, but it will be your function in this case to make findings as to special questions which are submitted to you. In making your findings, you should bear in mind that to answer an interrogatory, you must find that the answer to the interrogatory has been proven by the burden of proof. It requires the agreement of six of the jurors to answer any interrogatory, but it is not necessary that the same six jurors agree to the answer to each interrogatory.

Upon retiring to the jury room, you will select one of your number to act as foreperson, who will preside over your deliberations and sign the verdict to which you agree. The foreperson should not dominate the jury, but the foreperson's opinion should be given the same weight as the opinions of the other members of the jury. This is a civil action and six members of the jury may find and return a verdict. As soon as six or more of you shall have agreed upon a verdict, you shall have it signed and dated by your foreperson and then shall return it to this room.

You may take these Instructions with you to the jury room and return them with your verdict. The Court will hand you blank forms of verdict. When you have agreed upon your verdict, notify the Bailiff having you in charge, and he will conduct you into the Court.

Defendants' Proposed Jury Instruction No. 57: Tooele Associates' Breach of Contract Claims Against Tooele City.

Tooele Associates claims that Tooele City breached the Development Agreement and its amendments by not performing its obligations as follows:

1. By failing to consent to assignments of the Development Agreement's rights and obligations to Perry/Tooele Associates, LLC, Perry Homes, Inc., L.H. Perry Investments, LLC, and Overlake Golf, LLC pursuant to Section XVIII;

2. By refusing the 10 year extension of the Development Agreement pursuant to Section XXIII;

3. By refusing to approve, and threatening refusal of, applications for the creation of new subdivisions within the Overlake Project Area;

5. By refusing to recognize and accept as complete the public improvements in the Overlake Project Area subdivisions Overlake Estates Phases 1B, 1C, 1D, 1E, 1F and 1G;

6. By creating arbitrary and incomplete punch lists for the public improvements constructed by Tooele Associates in the Overlake Project Area's subdivisions;

7. By slowing or refusing to give final inspections of the public improvements constructed by Tooele Associates in the Overlake Project Area's subdivisions;

8. By requiring Tooele Associates to complete the same remedial work within the Overlake Project Area's subdivisions multiple times;

9. By requiring that Tooele Associates complete public improvements that were not initially required as a part of the construction of certain subdivisions;

10. By misinterpreting and misapplying its own public improvement ordinances in relation to the Overlake Project Area's subdivisions;

11. By refusing to recognize and accept its own admissions that public improvements within the Overlake Project Area's subdivisions were complete;

12. By requiring Tooele Associates to complete public improvements to standards that are not found within the Development Agreement, the approved construction drawings, the Bond Agreements or the City's Ordinances and/or that are not required of other similarly situated developers;

13. By finding and asserting that Tooele Associates had materially breached the Development Agreement;

14. By finding and asserting that it is not required to comply with its obligations under the Development Agreement;

17. By asserting meritless, trivial and frivolous claims against Tooele Associates;

18. By failing to commence site design and site improvements within 180 days of Tooele Associates' transfer to the City of land donations provided earlier than final plat or final site plan approval;

19. Tooele Associates claims that it has been damaged as a result and wants Tooele City to pay it money to compensate it for the damages it claims to have suffered.

Tooele City denies Tooele Associates' claims and in its defense claims primarily that it did not breach the Development Agreement and its amendments mostly because the Development Agreement and its amendments impose no obligation on Tooele City to act or not act in the manner alleged; and Tooele Associates' claim fails due to the non-

occurrence of a condition to Tooele City's performance: Tooele Associates' own performance of the Development Agreement.

Jury Instruction No. 58

Ordinance Enforcement and Duties of City Officials

Ordinarily, the prior non-enforcement of an ordinance by Tooele City officers would not preclude Tooele City from later enforcing that ordinance.

Likewise, Tooele City employees are bound by ordinances and are not at liberty to waive or alter the effect of City Ordinances.

However, where exceptional circumstances exist and where an injustice of sufficient gravity may be avoided, the government may be estopped from enforcing an ordinance against a citizen.

Jury Instruction No. 59

Class B & C Road Funds

Pursuant to Utah law, Class B and Class C roads are public highways, roads or streets that are traveled ways under the jurisdiction of, and maintained to a minimum standard or higher by a county or incorporated city or town, over which a conventional two-wheel drive vehicle may travel.

Instruction No. 60 : Expectation Damages – General.

Tooele Associates claims that it is entitled to recover damages based on its expectation that Tooele City would perform Tooele City's obligations under the Development Agreement and its amendments. If Tooele Associates is damaged by a breach of the Development Agreement and its amendments, then it has a right to recover damages that follow naturally from the breach as follows:

(1) the loss of the benefits from the Development Agreement caused by Tooele City's breach; minus,

(2) any cost or other loss that Tooele Associates has avoided by not having to perform.

Tooele Associates has the burden of proving these damages.

Instruction No. 61: Authority of Tooele City Council and Knowledge Imputed to Developers.

A city through its agents should not so act as to mislead a developer into making commitments and incurring expenses which will result in unfairness and injustice to him. Notwithstanding the foregoing, the developer, as a responsible individual engaged in an important business undertaking, is obliged to know the law and the ordinances governing the creation of subdivisions.

It is so plain as to leave no room for misunderstanding that the prerogative and responsibility for making the final and controlling decisions as to the growth and management of the city is vested in the city council; and that what is done by the city engineer and by the planning and zoning commission are but preliminary to and are to be regarded as advisory to that governing body.

Jury Instruction No. 62

No Duty to Undertake Futile Acts

The law does not require that any party undertake futile or useless measures that would serve no useful purpose.

Instruction No. 63 : Performance Excused by Material Breach.

Tooele City contends that it was excused from performing its remaining obligations under the Development Agreement because of Tooele Associates' conduct in failing to complete public improvements. In order to establish this as a justification for not performing Tooele City's remaining obligations under the contract, Tooele City must prove that Tooele Associates breached an important part of what Tooele Associates had promised to do. An action or duty is an important part of a party's performance under a contract if a reasonable person would not have made the contract unless a promise regarding that action or duty had been included. That is, Tooele City would be excused from performing if the Tooele Associates' conduct in failing to complete public improvements related to an essential part of the Development Agreement. On the other hand, if Tooele Associates breached only a minor or unimportant part of the Development Agreement, Tooele City would not be excused from performing.

Consequently, if you find that Tooele Associates' conduct was the type of breach that had something to do with an essential part of the Development Agreement, you must find that Tooele City was excused from further performance under the contract. If you find that Tooele Associates' conduct was unimportant in relation to what ~~the defendant~~ had promised to perform, you must find Tooele City was required to continue to perform, although Tooele City may still be entitled to compensation for the breach.

Tooele Associates

Instruction No. 14 : City Employees are Bound by Ordinances and Contract Requirements.

Tooele City employees do not have the authority to waive requirements of the Development Agreement, the Annexation Agreement, or the Bond Agreements.

Likewise, Tooele City employees and officials have no authority to waive or otherwise alter the effect of City ordinances.

Instruction No. 15 : Running with the Land.

The Development Agreement does not run with land that Tooele Associates transfers unless the recipient of the land has received an assignment of the Development Agreement to which Tooele City gave prior written consent.

Instruction No. 66: Written Change Orders.

The requirement for written change orders is binding on the parties.

Instruction No. 67: Causation.

Any damages you award must be caused by the wrongs complained of.

Instruction No. 68: Nominal Damages.

A party damaged by the other party's breach of the contract has a right to recover the damages caused by the breach. However, if the party claiming breach has not proved any actual or substantial damages caused by the breach, or if it has not proved the amount of damages, then you may award as damages a small or nominal sum such as One Dollar.

Instruction No. 69: Agreement on Special Verdict.

I am going to give you a form called the Special Verdict that contains several questions. You must answer the questions based upon the evidence you have seen and heard during this trial.

Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.

As soon as six or more of you agree on the answer to each question, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.

Tab C

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TOOELE ASSOCIATES L.P., et al.;

Plaintiffs,

vs.

TOOELE CITY, et al.;

Defendants.

TOOELE CITY;

Third-Party Plaintiff,

vs.

FORSGREN ASSOCIATES, INC., et al.;

Third-Party Defendants.

SPECIAL VERDICT FORM

Civil No. 060919737

Judge Randall Skanchy

SPECIAL VERDICT FORM

At least six of the eight of you must agree to the answers to the questions below, but they need not be the same six on each question. Unless at least six of you agree, you may not return an answer to any question.

We, the jury, find as follows:

Section I: Tooele Associates' Claims.

1. Has Tooele Associates proven by a preponderance of the evidence that Tooele City materially breached the Development Agreement, including its implied covenant of good faith and fair dealing?

YES: X NO:____

- If you answered "NO" to this Question, **DO NOT ANSWER ANY MORE QUESTIONS IN SECTION I.** Please skip to Question 6 in Section II.
- If you answered "YES" to this Question, identify how Tooele City breached the Development Agreement:

a. By refusing to recognize and accept as complete the public improvements in the Overlake Project Area subdivisions Overlake Estates Phases 1B, 1C, 1D, 1E, 1F or 1G?

YES:____ NO: X

b. By refusing to recognize and approve assignments of the Development Agreement to Perry/Tooele Associates, LLC, Perry Homes, Inc., L.H. Perry Investments, LLC and Overlake Golf, LLC?

YES: X NO:____

c. By failing and refusing to extend the term of the Development Agreement pursuant to Section XXIII of the Development Agreement?

YES: X NO:____

d. By creating arbitrary and incomplete punch lists for the public improvements constructed by Tooele Associates in the Overlake Project Area's subdivisions?

YES:___ NO:X

e. By slowing or refusing to give final inspections of the public improvements constructed by Tooele Associates in the Overlake Project Area's subdivisions?

YES:X NO:___

f. By misinterpreting and misapplying its own public improvement ordinances in relation to the Overlake Project Area's subdivisions?

YES:X NO:___

g. By refusing to recognize and accept its own admissions that public improvements within the Overlake Project Area's subdivisions were complete?

YES:X NO:___

h. By requiring Tooele Associates to complete public improvements to standards that are not found within the Development Agreement, the approved construction drawings, the Bond Agreements or the City's Ordinances and/or that are not required of other similarly situated developers?

YES:X NO:___

i. By refusing to approve, and threatening refusal of, applications for the creation of new subdivisions within the Overlake Project Area?

YES:X NO:___

j. By finding and asserting that Tooele Associates had materially breached the Development Agreement?

YES:___ NO:X

k. By asserting meritless, trivial and frivolous claims against Tooele Associates?

YES:___ NO:X

l. By failing to commence site design and site improvements within 180 days of Tooele Associates' transfer to the City of land donations provided earlier than final plat or final site plan approval?

YES: X NO:____

2. Has Tooele City proven by a preponderance of the evidence that Tooele Associates materially breached the Development Agreement?

YES: X NO:____

- If you answered "NO" to this Question, skip to Question 4.
- If you answered "YES" to this Question, identify how Tooele Associates breached the Development Agreement:

a. By failing to complete public improvements in Overlake pursuant to Sections VII.2 and VIII.2 of the Development Agreement?

YES:____ NO: X

b. By failing to comply with the requirements for the approval of subdivision plats and site plans and all other applicable ordinances, resolutions, policies, and procedures of Tooele City, pursuant to Sections III.G and XVII of the Development Agreement?

YES: X NO:____

c. By failing to set aside and provide land in Overlake for public uses, including for public schools, pursuant to Sections IX.2, X.2, and XI.2 of the Development Agreement?

YES:____ NO: X

d. By assigning portions of the Development Agreement to one or more parties without the prior written consent of Tooele City pursuant to Section XVIII of the Development Agreement?

YES:____ NO: X

e. By failing to pay amounts owed for water used to irrigate the Overlake Golf Course pursuant to Section 8 of Amendment #4 to the Development Agreement?

YES: X NO:____

f. By failing to construct a golf course on approximately 258 acres of land in Overlake pursuant to Section X.B of the Development Agreement?

Yes:____ No: X

3. Has Tooele Associates proven that Tooele City waived its claims and its defenses, as stated in Question 2, that Tooele Associates materially breached the Development Agreement and/or Bond Agreements?

YES: X NO:____

- If you answered "YES" to this Question, continue on to Question 4.
- If you answered "NO" to this Question, **DO NOT ANSWER ANY MORE QUESTIONS IN SECTION I.** Please skip to Question 6 in Section II.

4. Has Tooele Associates proven to a reasonable certainty:

a. the amount of losses Tooele Associates has suffered as a result of Tooele City's breach of the Development Agreement from 2003 to May 15, 2009?

YES: X NO:____

b. the amount of losses Tooele Associates will suffer as a result of Tooele City's breach of the Development Agreement from May 15, 2009, to 2017?

YES: X NO:____

- If you answered "YES" to either portion of this Question, continue on to Question 5.
- If you answered "NO" to both portions of this Question, **DO NOT ANSWER ANY MORE QUESTIONS IN SECTION I.** Please skip to Question 6 in Section II.

5. Identify the amount of Tooele Associates' historic and future losses:

a. Historic loss: What losses has Tooele Associates proven that it has suffered as a result of Tooele City's breach of the Development Agreement from 2003 to May 15, 2009?

$ 5 Million (do not enter any amount if you answered "NO" to Question 4.a)

b. Future loss: What future losses has Tooele Associates proven that it will suffer as a result of Tooele City's breach of the Development Agreement from May 15, 2009, to 2017?

$ 17.5 Million (do not enter any amount if you answered "NO" to Question 4.b)
17,500,000

Section II: The City's Claims.

6. Has Tooele City proven that Tooele Associates breached the Bond Agreements and Bond Agreement amendments by failing to complete public improvements in Overlake?

YES: X NO:____

7. Has Tooele City proven that Tooele Associates breached Sections III.G, VII.2, VIII.2, and XVII of the Development Agreement by failing to complete public improvements in Overlake?

YES: X NO:____

- If you answered "YES" to this Question or Question 6, continue on to Question 8.
- If you answered "NO" to this Question and Question 6, skip to Question 11.

8. Has Tooele Associates proven that Tooele City waived its rights to claim that Tooele Associates did not complete public improvements in Overlake required by the Development Agreement and the Bond Agreements?

YES:____ NO: X

- If you answered "NO" to this Question, continue on to Question 9.
- If you answered "YES" to this Question, skip to Question 11.

9. Has Tooele City proven to a reasonable certainty the amount of costs that it will have to incur to complete public improvements in Overlake required by the Development Agreement and the Bond Agreements?

YES: X NO:____

- If you answered "YES" to this Question, continue on to Question 10.
- If you answered "NO" to this Question, please skip to Question 11.

10. What is the amount of damages Tooele City suffered, if any, from Tooele Associates' breach of the Development Agreement or the Bond Agreements based upon Tooele Associates' failure to complete public improvements in Overlake?

$ 1,750,000

11. Has Tooele City proven that Tooele Associates breached Section 8 of Amendment #4 to the Development Agreement by failing to pay amounts owed for water used to irrigate the Overlake Golf Course?

YES: X NO:____

- If you answered "YES" to this Question, continue on to Question 12.
- If you answered "NO" to this Question, **DO NOT ANSWER ANY MORE QUESTIONS. Please have the jury foreperson sign and date this Special Verdict Form and alert the courtroom deputy that you have arrived at a verdict.**

12. Has Tooele City proven to a reasonable certainty the amounts owed by Tooele Associates for water used to irrigate the Overlake Golf Course?

YES: X NO:____

- If you answered "YES" to this Question, continue on to Question 13.

- If you answered "NO" to this Question, **DO NOT ANSWER ANY MORE QUESTIONS. Please have the jury foreperson sign and date this Special Verdict Form and alert the courtroom deputy that you have arrived at a verdict.**

13. What is the amount of damages Tooele City suffered, if any, from Tooele Associates' failure to pay amounts owed for water used to irrigate the Overlake Golf Course?

$ 70,000

Please have the jury foreperson sign and date this Special Verdict and alert the courtroom deputy that you have arrived at a verdict.

DATED this 19 day of June, 2009.

Foreperson

#256683 v11 slc

Tab D

RELEVANT UTAH RULES OF CIVIL PROCEDURE

RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

(a) Special verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58A. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58A in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Tab E

Utah Constitution

Article I, Section 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Tab F